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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.,
PETITIONERS

v.

SWEET HOME CHAPTER OF COMMUNITIES
FOR A GREAT OREGON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Under Section 9(a)(1) of the Endangered Species Act of 1973, 16 U.S.C. 1538(a)(1), it is unlawful for any person (including a federal agency) to "take" an endangered or threatened species, except for certain "takes" that are incidental to otherwise lawful activities and authorized by the Secretary of the Interior under conditions designed to minimize and mitigate the impact on the species, 16 U.S.C. 1536(b)(4), 1539(a)(1). The Act defines the term "take" to include "harm." 16 U.S.C. 1532(19). The question presented is:

Whether the regulation promulgated by the Secretary in 1975 and 1981 that defines "harm" to include "significant habitat modification or degradation" that "actually kills or injures wildlife," 50 C.F.R. 17.3, is invalid on its face.

PARTIES TO THE PROCEEDINGS

The Secretary of the Interior, currently Bruce Babbitt, and the Director of the United States Fish and Wildlife Service, an agency within the Department of the Interior, currently Mollie H. Beattie, were the appellees in the proceeding below, where respondents Sweet Home Chapter of Communities for a Great Oregon, Betty F. Orem, Erickson Busheling, Inc., Southeastern Lumber Manufacturers Association, Inc., Southern Timber Purchasers Council, Ridgetree Logging Company, Shotpouch Logging Company, Jean Reynolds, Emmy G. Birkenfeld, and Pat McCollum, were appellants.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Secretary of the Interior, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The August 12, 1994, statements accompanying the court of appeals' denial of petitioners' petition for rehearing and suggestion for rehearing en banc (App., *infra*, 89a-99a) are reported at 30 F.3d 190. The March 11, 1994, opinion of the court of appeals on respondents' petition for rehearing (App., *infra*, 1a-41a) is reported at 17 F.3d 1463. The July 23, 1993, initial opinion of the court of appeals (App., *infra*, 42a-72a) is reported

at 1 F.3d 1. The opinion of the district court (App., *infra*, 73a-88a) is reported at 806 F. Supp. 279.

JURISDICTION

The court of appeals entered its initial judgment on July 23, 1993. The court of appeals thereafter granted respondents' petition for rehearing, and on March 11, 1994, it entered a new judgment that differed from its earlier judgment. Petitioners then sought rehearing of that new judgment, and the court of appeals denied that petition for rehearing on August 12, 1994. App., *infra*, 89a-99a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Pertinent provisions of the Endangered Species Act (§§ 3, 7, 9, and 10; 16 U.S.C. 1532, 1536, 1538, 1539) are reprinted at App., *infra*, 103a-114a.

2. The Secretary of the Interior's regulation defining "harm" for purposes of the Endangered Species Act, 50 C.F.R. 17.3, provides:

> *Harm* in the definition of "take" in the [Endangered Species] Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavorial patterns, including breeding, feeding or sheltering.

STATEMENT

This case concerns the facial validity of a regulation, 50 C.F.R. 17.3, promulgated by the United States Fish and Wildlife Service, an agency within the Department of the Interior, to define the term "harm" as it is used in the prohibition in Section 9 of the Endangered Species Act, 16 U.S.C. 1538(a)(1), against the "take" of

an endangered species. The regulation defines "harm" to mean an act that actually kills or injures wildlife, including significant habitat modification or degradation that has that effect. The district court sustained the validity of the "harm" regulation (as well as another challenged regulation). In its initial opinion, the court of appeals affirmed the judgment of the district court. On rehearing, the court of appeals held the regulation invalid insofar as it defines "harm" to embrace habitat modification, and the court of appeals reversed the district court's judgment to that extent.

1. The Endangered Species Act, 16 U.S.C. 1531 *et seq.* (ESA), "seeks to protect species of animals [and plants] against threats to their continuing existence caused by man." *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2135 (1992). The Act was passed in 1973 in response to increasing concern about the extent to which "various species of fish, wildlife, and plants * * * have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. 1531(a)(1). The purposes of the Act include providing "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. 1531(b). The ESA provides for protection of endangered and threatened species through a number of different techniques.[1]

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[1] Section 4 of the ESA, 16 U.S.C. 1533, provides for the determination and listing of species by the Secretary as "endangered" or "threatened." In making the determination regarding the listing of species, the Secretary is to consider, *inter alia*, "the present or threatened destruction, modification, or curtailment of its habitat or range." 16 U.S.C. 1533(a)(1)(A). "Endangered species" means "any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present

a. Section 9(a)(1) of the ESA (16 U.S.C. 1538 (a)(1)) provides, *inter alia*, that it is unlawful for any person to "take" any endangered species. By regulation, the "take" prohibition also applies to threatened species.[2] Section 3(19) of the ESA (16 U.S.C. 1532(19)) defines the term "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." The "take" prohibition may be enforced through suits for injunctive relief, 16 U.S.C. 1540(e)(6), as well as civil and criminal penalties, 16 U.S.C. 1540(a), and (b).

The Fish and Wildlife Services (FWS) promulgated a regulation in 1975 to define "harm" for purposes of the "take" prohibition in Section 9 of the ESA. 40 Fed. Reg. 44,412. As revised without substantive change in 1981, see 46 Fed. Reg. 54,748, the "harm" regulation (50 C.F.R. 17.3) provides:

> *Harm* in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

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an overwhelming and overriding risk to man." 16 U.S.C. 1532(6). "Threatened species" means "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. 1532(20). Endangered and threatened species are referred to collectively as "listed species."

[2] Under Section 4(d), 16 U.S.C. 1533(d), the Secretary may, by regulation, prohibit with respect to threatened species any act prohibited under 16 U.S.C. 1538(a)(1). The Secretary, through authority delegated to the Director of the Fish and Wildlife Service, extended the "take" prohibition in 16 U.S.C. 1538(a)(1) to threatened species. See 50 C.F.R. 17.31(a), 17.21(c)(1). Thus, except where special rules applicable to particular species otherwise provide, see 50 C.F.R. 17.40-17.48, the "take" prohibition applies to all listed species.

In promulgating the regulation, the Secretary concluded that a showing of actual death or injury to the species is necessary to constitute "harm." 46 Fed. Reg. 54,748 (1981). The Secretary explained, however, that "harm" is not limited "to direct physical injury to an individual member of the wildlife species." *Ibid.* Rather, "[d]eath or injury * * * may be caused by impairment of essential behavioral patterns [as a result of habitat modification] which can have significant and permanent effects on a listed species." *Ibid.* The Secretary emphasized that without a showing of such impacts, habitat modification does not "harm" the species and cannot be considered a take. "[H]abitat modification or degradation, standing alone, is not a taking pursuant to section 9." 46 Fed. Reg. 54,750 (1981).

In 1982, Congress enacted Section 10(a)(1)(B) of the Act, which authorizes the Secretary to permit a taking that would otherwise be prohibited under Section 9(a)(1)(B), if such taking is "incidental to, and not [for] the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. 1539(a)(1)(B). The Secretary may not issue such an "incidental take permit" unless the applicant submits a conservation plan and the Secretary finds, *inter alia*, that the applicant will, "to the maximum extent possible, minimize and mitigate the impact of [such] taking," that "the applicant will ensure that adequate funding for the plan will be provided," that "the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild," and that the applicant will take "such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan." 16 U.S.C. 1539(a)(2)(A) and (B).

b. In addition to Section 9, the ESA includes other methods of protecting endangered and threatened species. Section 4 authorizes the Secretary to designate "critical habitat" for listed species (see note 4, *infra*), and to

develop recovery plans to provide for the conservation and survival of such species. 16 U.S.C. 1533(a)(3), 1533(f). Section 5 of the Act directs the Secretary to utilize land acquisition and other authority under other wildlife protection statutes to acquire land for the purpose of conserving endangered species. 16 U.S.C. 1534.

Section 7 applies to federal agencies, and provides that they "shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of [the Act] by carrying out programs for the conservation of endangered species and threatened species." 16 U.S.C. 1536(a)(1).[3] In addition, in consultation with the Secretary, federal agencies must "insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined * * * to be critical,[4] unless such agency has been granted an exemp-

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[3] Section 3(3) of the Act, 16 U.S.C. 1532(3), defines "conservation":

> The terms "conserve", "conserving", and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

16 U.S.C. 1532(3).

[4] The Act defines "critical habitat" for a threatened or endangered species to mean:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed * * *, on which are found those physical or biological features (I) essential to

ton for such action * * * pursuant to subsection (h)." [5] 16 U.S.C. 1536(a)(2). The Section 7 process applies to an agency's issuance of licenses and permits to private parties, as well as actions undertaken by the agency itself. See 16 U.S.C. 1536(a)(3).

In 1982, Congress provided a mechanism for authorizing "incidental takes" by federal agencies, just as it did for such takes by private parties. See page 5, *supra*. Under the 1982 amendments, the Fish and Wildlife Service must prepare, as part of the biological opinion it furnishes to the agency during the Section 7 consultation process, what is known as an "incidental take statement." See 16 U.S.C. 1536(b)(4). That statement specifies the impact of any take that is anticipated to occur incidental to the proposed federal action as well as the "reasonable and prudent measures" that the Secretary considers "necessary or appropriate to minimize such impact," and sets forth the "terms and conditions * * * that must be complied with by the Federal agency or applicant [6] (if any), or both, to implement the measures specified." 16 U.S.C. 1536(b)(4)(B).[7]

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the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed * * * upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. 1532(5)(A).

[5] Subsection (h) of Section 7 provides for the granting of an exemption from the prohibitions of Section 7 by a specially constituted Endangered Species Committee. See 16 U.S.C. 1636(e)-(n).

[6] The term "applicant" refers to an applicant seeking a permit or license from a federal agency.

[7] Authorization for exemptions from the taking prohibition in Section 9 in certain circumstances was enacted in 1978 as part of the special exemption procedure under subsections (e)-(n) of Section 7. See 16 U.S.C. 1536(*o*).

There often is some overlap among the provisions of the Act applicable to federal agencies. For example, within Section 7(a)(2) itself, issues considered in determining whether a federal action is "likely to jeopardize the continued existence" of a listed species may overlap with those relevant to determining whether the action is likely to "result[] in the destruction or adverse modification" of habitat designated by the Secretary as critical for the species. 16 U.S.C. 1536(a)(2). Also, because federal agencies are subject to both Seciton 7(a)(2) and the "take" prohibition in Section 9, a particular action may cause a "taking" of an endangered species or threatened species, but not adversely affect the species to such an extent that it violates the "jeopardy" standard in Section 7(a)(2). So too, an action may result in the destruction or adverse modification of "critical habitat," and yet not result in a "take" of an endangered species because it does not "actually kill or injure wildlife." 50 C.F.R. 17.3.

2. Respondents are individuals and organizations in the Pacific Northwest and Southeast who are engaged in, or depend upon, timber harvesting. They allege that they are affected by the "harm" regulation because of its application to the northern spotted owl, which was listed as a threatened species in 1990, 55 Fed. Reg. 26,114, and the red-cockaded woodpecker, which was listed as an endangered species in 1970. 50 C.F.R. 17.11.[8]

Respondents brought this action as a facial challenge to 50 C.F.R. 17.3 (which defines "harm"), and 17.31(a) (which extends protections to threatened species) (see note 2, *supra*). Respondents did not challenge either regulation as applied to any of their own actions in relation to the listed birds.

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[8] The red-cockaded woodpecker was listed pursuant to authority under the Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275, a predecessor to the Endangered Species Act.

Respondents raised two claims with respect to the "harm" regulation.[9] First, they contended that the regulation failed under the first step of the analysis in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984), because the regulation's inclusion of certain habitat modification activities within the meaning of "harm" was contrary to what in their view was an unambiguously expressed intent of Congress to exclude such activities from the statutory prohibition against "takes" of endangered species. Second, respondents claimed that the "harm" regulation is void for vagueness.

On cross-motions for summary judgment, the district court upheld the validity of the "harm" regulation, concluding that the "language, structure, and history of the ESA reveal that Congress intended an expansive interpretation of the word 'take,' an interpretation that encompasses habitat modification." App., *infra*, 82a-83a. The court stated that even if it were to find the ESA "silent or ambiguous" with respect to the issue, it would uphold the Secretary's regulation as a reasonable interpretation of the Act. *Id.* at 83a. The district court also held that the regulatory definition of "harm" was not void for vagueness. *Id.* at 83a-85a.

3. a. On July 23, 1993, a divided panel of the court of appeals initially affirmed the judgment of the district court. The court issued a brief *per curiam* order. App., *infra*, 46a. Chief Judge Mikva and Judge Williams wrote separate concurring opinions (*id.* at 59a, 67a), and Judge Sentelle dissented (*id.* at 68a).

b. Respondents filed a petition for rehearing, limited to the question whether the "harm" regulation is contrary to congressional intent. On March 11, 1994, the panel granted respondents' petition for rehearing and, in another divided decision, reversed the district court's judg-

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[9] The courts below sustained 50 C.F.R. 17.31(a), and this petition therefore is limited to the "harm" regulation.

ment with respect to the validity of the regulation defining "harm." [10] App., *infra*, 1a-24a. Judge Sentelle filed a concurring opinion (*id.* at 25a) and Chief Judge Mikva filed a dissenting opinion (*id.* at 27a).

The court of appeals concluded that the "harm" regulation was neither clearly authorized by Congress nor a reasonable interpretation of the statute, citing *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 842-843, 844. App., *infra*, 3a. The court acknowledged that the term "harm" may be read to include the sort of habitat modification covered by the regulation. It reasoned that "harm" should not be construed to cover such actions, however, because, in its view, the other words in the statutory definition ("harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect") "contemplate the perpetrator's direct application of force against the animal taken"—*e.g.*, "A hit B." *Id.* at 4a. The court applied the maxim "*noscitur a sociis*" (that a word is known by the company it keeps) and concluded that the term "harm" should be read in a similar manner. *Id.* at 5a-7a.

The court further concluded that the "structure and history of the Act confirm this reading." App., *infra*, 7a. It read the "harm" regulation as having "transposed to the private anti-'take' provision" the duty of federal agencies under Section 7(a)(2) to refrain from "'*the destruction or adverse modification of habitat* of such species which is determined * * * to be critical.'" *Ibid.* The court found that result to be contrary to the ESA, which assigned "the primary task of habitat preservation to the government," rather than to private parties. *Id.* at 8a. Finally, the court rejected the argument that the 1982 amendments to the ESA that authorized permits for "in-

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[10] The court's original judgment is otherwise unaltered. App., *infra*, 24a. Thus, the court of appeals adhered to its rulings that 50 C.F.R. 17.31 is valid and that the "harm" regulation is not void for vagueness.

cidental takings" reflected a congressional ratification of the Secretary's interpretation. *Id.* at 10a-24a.

In a concurring opinion, Judge Sentelle expressed the view that the statutory language and structure of the ESA provided a sufficient basis for invalidating the "harm" regulation and that resort to the legislative history was unnecessary. App., *infra,* 25a. He also reasoned that to define "harm" as the Secretary does would render superfluous the other words in the statutory definition of "take." App., *infra,* 25a.

Judge Mikva dissented. App., *infra,* 27a. He first objected that the majority erroneously shifted the burden to the government agency to show that its interpretation is clearly authorized or reasonable, whereas, under *Chevron,* the burden is on those challenging governmental action to show either that Congress has directly spoken on the issue or that the agency's interpretation is unreasonable. *Id.* at 28a. In this case, Judge Mikva concluded that the statute is silent, or at best ambiguous on the scope of the term "harm," so that the issue is whether the Secretary's interpretation of that term constitutes a permissible reading of the statute. He concluded that it does, expressing the view that the majority's application of *noscitur a sociis* was fatally flawed because the "definition of 'take' does not conform to the paradigm of one broad word alongside many narrow ones." App., *infra,* 30a.

Judge Mikva found additional support for the Secretary's interpretation in the legislative history of the ESA, including the 1982 amendments. The amendments, he reasoned, demonstrate that Congress thought that the original prohibition against "takings" included some "incidental takings," and that by "incidental takings" Congress meant to include certain habitat modification. App., *infra,* 37a. Finally, Judge Mikva pointed out that the court's ruling creates a conflict with the Ninth Circuit's decision in *Palila* v. *Hawaii Dep't of Land & Natural*

Resources, 852 F.2d 1106, 1107-1109 (9th Cir. 1988) (*Palila II*).

c. On April 25, 1994, petitioners filed a petition for rehearing with suggestion for rehearing en banc, which the court denied on August 12, 1994. App., *infra*, 89a-90a. Four members of the court of appeals voted to grant rehearing en banc. *Id.* at 90a. Three of those judges—Judge Silberman, joined by Chief Judge Mikva and Judge Wald—filed a statement expressing the view that applying *Chevron* deference, the interpretation of "harm" in the Secretary's regulation should be sustained. *Id.* at 98a.

REASONS FOR GRANTING THE PETITION

The court of appeals erred in holding that the Secretary's longstanding regulation defining the term "harm" in the prohibition against the "taking" of endangered species in Section 9(a)(1) of the Endangered Species Act of 1973 is invalid on its face. That regulation is consistent with the ordinary meaning of the term "harm," reflects a reasonable administrative interpretation of the statutory provisions in the context of the Act as a whole, and is supported by the purposes and legislative history of the Act and by this Court's discussion of the predecessor regulation in *TVA v. Hill*, 437 U.S. 153, 184-185 & n.30 (1978). The contrary conclusion by the court below conflicts with *Palila* v. *Hawaii Dep't of Land & Natural Resources*, 852 F.2d 1106 (9th Cir. 1988), and is also inconsistent with decisions of other courts of appeals that have considered the "take" prohibition in the context of habitat modifications. The scope of the "take" prohibition is, in addition, a question of exceptional public importance in the administration of the ESA and the protection of endangered and threatened species. Review by this Court therefore is warranted.

1. a. To prevail in a facial challenge to a regulation, the plaintiff "must establish that no set of circumstances

exists under which the [regulation] would be valid." *Reno* v. *Flores*, 113 S. Ct. 1439, 1446 (1993), quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987); see also *INS* v. *National Ctr. for Immigrants' Rights*, 112 S. Ct. 551, 555 (1991); cf. *Bowen* v. *Yuckert*, 482 U.S. 137, 154 n.12 (1987). Thus, in this case, respondents were required to establish that in no set of circumstances could the statutory prohibition against the "taking" of a protected species include "harm" to the species that takes the form of "significant habitat modification or degradation" that "actually kills or injures wildlife." 50 C.F.R. 17.3. This respondents failed to do.

The term "take" is defined in the Act to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. 1532(19). This case includes the meaning of one of those enumerated forms of taking: "harm." In ordinary usage, the word "harm," in its verb form, means "to cause hurt or damage to: INJURE," *Webster's Third New International Dictionary* 1034 (1986), or "to do or cause harm to; injure; damage; hurt," *The Random House Dictionary of the English Language* 873 (2d ed. 1987). This common understanding of the word includes the actual killing or injury of wildlife whether by means of modification or degradation of its habitat of by other causes. The statutory definition of "take" itself expressly includes "kill" and "wound," and there is no reason why Congress would have intended to allow those consequences simply because they are brought about by the destruction of habitat essential for the wildlife's breeding, feeding, or shelter, rather than by the discharge of a firearm or other direct application of force (the types of actions to which the court of appeals believed the prohibition is limited. App., *infra*, 4a).[11]

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[11] For example, a bulldozer clearing land may instantaneously kill an individual member of a species as well as cause the death

The presence of the words "harass" and "pursue" in the definition of "take" also weighs against the court of appeals' crabbed interpretation, for neither necessarily (or even ordinarily) involves the direct application of force.[12] Read in the context of the various other words in the definition of "take" that affirmatively support the Secretary's elaboration of the meaning of "harm," the court of appeals' reliance on the principle *noscitur a sociis* (App., *infra*, 6a-7a) was misplaced.

The assumption underlying the court's invocation of *noscitur a sociis* is that Congress must have intended for certain words in the definition of "take" that involve the application of physical force ("hunt," "shoot," "trap," "capture") to furnish a narrowing focus even with respect to other words, such as "harm," that have broader connotation. Whatever the merits of that proposition in other settings, it has no merit here, especially since the relevant statutory language contains a number of both broader and narrower terms. Congress's purpose in including the terms "harass" and "harm" was to ensure that the term "take" would have a broader meaning than it had been given in wildlife statutes such as the Migratory Bird

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of the entire species if the clearing activity destroys the whole habitat on which the species is dependent.

[12] For example, Congress intended that the "harass" prohibition allow the "Secretary to regulate or prohibit the activities of bird-watchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young." H.R. Rep. No. 412, 93d Cong., 1st Sess. 11 (1973). Notwithstanding the court of appeals' suggestion that the release of sound waves or light particles fits the model of "A hit B," App., *infra*, 4a, the Act's inclusion of what might otherwise be regarded as benign actions that would be encompassed by the word "harass" do not reasonably fit the paradigm of direct physical force applied against an animal. The House Report, quoted above, confirms that the "take" prohibition instead focuses on the "effect" of an action on the species.

Treaty Act (MBTA).[13] The court of appeals' focus on physical blows to the body of individual animals, by contrast, effectively mirrors the MBTA concept of "take." The majority's endeavor to maintain conformity with the narrowest terms defining "take" defeats the intent explicitly expressed by the responsible congressional committees (even before the more expansive word "harm" was added to the bill) that "take" have a broad scope and include actions having the effect of significantly disrupting a species' normal behavioral patterns.[14] See

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[13] The MBTA, 16 U.S.C. 703 *et seq.*, was enacted 55 years prior to the ESA for the purpose of halting the "indiscriminate slaughter of migratory birds." See, *e.g.*, 55 Cong. Rec. S5544-S5545 (daily ed. July 30, 1917); S. Rep. No. 2, 65th Cong., 1st Sess. (1917). The MBTA prohibits the taking of virtually every bird in the United States, not just endangered or threatened birds. The definition of "taking" under the MBTA, 16 U.S.C. 703 (1988 & Supp. V 1993), omits the words "harass" and "harm." See *Seattle Audubon Soc'y* v. *Evans*, 952 F.2d 297, 302-303 (9th Cir. 1991) ("Habitat destruction causes 'harm' to the owls under the ESA but does not 'take' them within the meaning of the MBTA."). When Congress enacted the Marine Mammal Protection Act in 1972 it included the word "harass" in the definition of "take." See 16 U.S.C. 1362(13) (Supp. V 1993). Then, when enacting the ESA in 1973, Congress enlarged the concept of "take" further by adding the word "harm" to the definition. See 16 U.S.C. 1532(19).

[14] The court's suggestion (App., *infra*, 9a-10a) that its narrow reading of "take" is supported by the failure of the Senate committee to adopt a proposed definition that made habitat modification a form of "take" disregards the circumstances surrounding the committee's action. The proposal before the committee would have made *any* habitat modification a "take." It did not include the limitations under the Secretary's narrower interpretation, which requires proof of significant modification and actual killing or injury as a result of significant impairment of essential behavioral patterns. In any event, the report gives no explanation of why the committee selected one proposed definition over the other, and the word "harm" was added during the floor debate purportedly to clarify language that was omitted from the draft that emerged from committee. 119 Cong. Rec. 25,683 (1973) (Sen. Tunney).

S. Rep. No. 307, 93d Cong., 1st Sess. 7 (1973) (" 'Take' is defined * * * in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife."); note 12, *supra*, quoting H.R. Rep. No. 412, 93d Cong., 1st Sess. 11 (1973).

Moreover, even if *noscitur a sociis* were properly invoked below, the court of appeals' characterization of the unifying theme of the statutory language is mistaken. The unifying concept of the specific terms chosen by Congress to define "take"—to "hunt, shoot, wound, trap, and collect," as well as the broader and more general terms "harass, harm, pursue" and "kill"—is that the conduct will result in some reasonably ascertainable and proximate injury (or death) to the protected species.[15] Thus, the statutory text does not compel the conclusion that the Secretary's regulation is invalid, as the court of appeals believed; the text affirmatively supports the validity of the regulation.

The 1982 amendments to the ESA reinforce the reasonableness of the Secretary's interpretation. In 1982, Congress acted to lessen the restriction imposed by the "take" prohibition by adding the provisions in Section 10 that authorize the issuance of permits allowing a "take" that is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. 1539(a)(1)(B). This description of the category of permitted "takes"—those that are merely "incidental" to otherwise lawful activity—surely encompasses those that result from the serious adverse consequences of habitat

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[15] The principle against surplusage, a maxim on which the concurring opinion below relied, App., *infra*, 25a, is also unenlightening. There is no reasonable definition of "harm" that would not render superfluous some of the other terms. Moreover, the principle against surplusage is in tension with *noscitur a sociis*. To avoid surplusage, the word "harm" must be given meaning that is different, rather than synonymous, with the other terms.

modification. Congress's provision of a mechanism for permitting such activities notwithstanding the "take" prohibition weighs against a construction of the prohibition that would not include such activities in the first place. Moreover, there is considerable evidence that, when it created the Section 10 permit program, Congress had specifically in mind incidental takes in connection with habitat modification activities. For example, the Section 10 incidental take permit process was described in H.R. Rep. No. 835, 97th Cong., 2d Sess. 30-32 (1982), and S. Rep. No. 418, 97th Cong., 2d Sess. 10 (1982), as being modeled after a situation in which the "take" of endangered butterflies was caused by the bulldozing of the butterflies' habitat in connection with "the development of some 300 dwelling units."[16] The incidental take permit provision was also intended to further the statutory purpose of habitat conservation. *Ibid.*[17]

b. Far from applying the standard for determining whether a regulation is invalid on its face (*i.e.*, whether there are any circumstances under which the regulation would be valid), the court of appeals took the opposite approach—it invalidated the "harm" regulation on the basis of imagined applications that were not before it. For example, the court of appeals stated that the regulation reflects an improbable relation to congressional intent

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[16] The cited development is described further in *Friends of Endangered Species, Inc.* v. *Jantzen*, 760 F.2d 976 (9th Cir. 1985); *Endangered Species Act of 1973: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 97th Cong., 2d Sess. 331-335 (1982) [*1982 House Hearings*].

[17] In addition, in the reauthorization hearings, objections to the regulatory definition of "harm" and proposals to change it were discussed in conjunction with the incidental take exemption. See *1982 House Hearings* at 240, 262, 273, 290-293, 328-329, 331, 343.

because it might forbid any modification of an area between 35 and 42 million acres in size because "some scientists" believe such an area is necessary to the survival of the threatened grizzly bear, even though the court acknowledged that such broad coverage represented the views of an "adherent of aggressive protection." App., *infra*, 6a.[18] By focusing only on extreme examples and the potential for unreasonably broad application of the regulation to specific species, the court of appeals failed

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[18] In the August 12, 1994, statement, the panel majority stated that in using that example, it understood that the regulation required that the habitat modification be "fatal" to grizzly bears. It explained that if millions of acres are necessary to the survival of grizzly bears then any material curtailment necessarily would involve death for members of the species. App., *infra*, 91a. The panel majority also stated, however, that it did not endorse the specific claim of what acreage might actually be necessary for the grizzlies. *Id.* at 91a n.1. That qualification is significant because it is unrealistic to assume that a take violation could be found with respect to any and all habitat modification activities based on such evidence.

The panel majority's August 12, 1994, statement also pointed to a Special Rule Concerning Take of the Threatened Coastal California Gnatcatcher, published at 58 Fed. Reg. 65,088 (1993), as evidencing that enforcement of the "harm" regulation entails Interior's exercise of power over large tracts of land. App., *infra*, 94a. The panel majority's reliance is misplaced, however, because the cited reference, 58 Fed. Reg. 65,090 (1993), is to a *state* planning process that encompasses 3.8 million acres. That area does not equate to gnatcatcher habitat, nor does the reference mean, as the panel majority suggests, that the "take" prohibition would apply to all habitat modification activities within that area. The Fish and Wildlife Service's issuance by special rule of an incidental take authorization for the gnatcatcher is largely the result of special circumstances in California whereby state law provides for a regional planning process that incorporates criteria that meet ESA incidental take standards. See 16 U.S.C. 1539(a)(2). The special rule effectively eliminates duplication of state, local and federal efforts and serves to reduce federal involvement.

to heed the limited nature of review accorded in a facial challenge.[19]

In any event, the court of appeals greatly exaggerated the breadth of the "harm" regulation. The court of appeals overlooked the fact that the evidentiary burden required to prove "actual death or injury" directly traceable to habitat-disturbing actions taken by a defendant imposes significant limitations on the regulation's application.

Prior to this case, the courts correctly interpreted the "harm" prohibition not to extend to activity that only potentially, as opposed to actually, causes (or will cause) harm. *American Bald Eagle* v. *Bhatti*, 9 F.3d 163, 166 (1st Cir. 1993) ("courts have granted injunctive relief only where petitioners have shown that the alleged activity has actually harmed the species or if continued will actually, as opposed to potentially, cause harm to the species"); see also *National Wildlife Fed'n* v. *Burlington N. R.R.*, 23 F.3d 1508, 1511-1513 (9th Cir. 1994)

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[19] The court of appeals also suggested that the regulation is unreasonable and overly broad because it is directed at harm flowing from the withholding of a benefit, rather than physical intrusions that wound an individual member of an endangered species. App., *infra*, 3a-4a. The August 12, 1994, statement reasserted that view and pointed to the Department of the Interior's commentary accompanying the "harm" rule, which stated that an "act" is inclusive of either commissions or "omissions" that would be prohibited by Section 9. App., *infra*, 91a; 46 Fed. Reg. 54,750 (1981). However, an "omission" constitutes an "act" prohibited by Section 9 only if there is a legal duty to act and the failure to discharge the duty causes a significant habitat modification that leads in turn to death or injury to a listed species. An example of such an omission might arise from a duty to maintain a licensed dam structure—a maintenance omission causing a dam breach could significantly destroy habitat and cause death or injury to a listed species as a result. The comment by the Department of the Interior does not encompass passive acts of nonfeasance or create a duty, where it otherwise would not exist, to maintain a listed species' habitat.

(corn spill was localized in nature and did not constitute significant habitat modification or cause significant impact); *Pyramid Lake Paiute Tribe of Indians* v. *United States Dep't of Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990) (evidence does not establish that diversion of water actually caused spawning problems); *National Wildlife Fed'n* v. *National Park Serv.*, 669 F. Supp. 384 (D. Wyo. 1987) (insufficient evidence of injury from plan designed to reduce conflicts between humans and grizzly bear); *Morrill* v. *Lujan*, 802 F. Supp. 424, 430-433 (S.D. Ala. 1992) (insufficient evidence that destruction of mouse habitat would cause injury to mouse). By the same token, the courts that have found violations of the regulation have recognized that it applies only where actual injury or death directly traceable to the actions of the defendant has occurred or will occur. See, *e.g.*, *Palila* v. *Hawaii Dep't of Land & Natural Resources*, 639 F.2d 495, 498 (9th Cir. 1981) (*Palila I*); *Palila II*, 852 F.2d at 1108-1110; *Sierra Club* v. *Yeutter*, 926 F.2d 429 (5th Cir. 1991) (enjoining Forest Service from even-aged lumber practices following documentation of dramatic decline in red-cockaded woodpecker colonies directly traceable to lumbering practice); *United States* v. *Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126, 1133 (E.D. Cal. 1992) (water district's pumping kills fish by creating water velocity that causes salmon to be pinned or battered against screens or by diverting fish into channels full of predators).

c. In sum, the Secretary's appropriately tailored regulation defining the term "harm" reflects a reasonable interpretation of the statutory term, and is supported by the structure of the Act as a whole and its purpose and legislative history. The court of appeals' contrary conclusion rests on an extravagant reading and speculative applications of the regulation, and thereby fails to respect both the limitations imposed by the Secretary's interpretation and application of his own regulation (see *Thomas*

Jefferson Univ. v. *Shalala*, 114 S. Ct. 2381, 2386 (1994)) and the nature of a facial challenge to a regulation.

2. a. The court of appeals' ruling conflicts with the Ninth Circuit's decision in *Palila II*, 852 F.2d at 1108. *Palila II* involved mouflon sheep that had been introduced in a particular area at an earlier time for the enjoyment of hunters, and a challenge to the maintenance of the sheep there because they feed on and destroy the mamane-naio woodlands upon which an endangered bird species, the Palila, depends for survival. The Ninth Circuit held:

> The Secretary's inclusion of habitat destruction that could result in extinction follows the plain language of the statute because it serves the overall purpose of the Act, which is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." . . . 16 U.S.C. § 1531(b). * * *
>
> The Secretary's construction of harm is also consistent with the policy of Congress evidenced by the legislative history. * * * If the "harassment" form of taking includes activities so remote from actual injury to the bird as birdwatching, then the "harm" form of taking should include more direct activities, such as the mouflon sheep preventing any mamane from growing to maturity.

Id. at 1108-1109.

Finally, the *Palila II* court concluded that the Secretary's "harm" definition is consistent with the legislative history of the 1973 Act stating that " '[t]ake' is defined in . . . the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." 852 F.2d at 1108, quoting S. Rep. No. 307, *supra*, at 7.[20] Similarly, the *Palila*

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[20] The United States filed a brief as *amicus curiae* in *Palila II* in support of affirmance of the district court's ruling that the destruction of certain vegetation constituted an unlawful "take"

II court noted that the 1982 ESA amendments supported the Secretary's interpretation because Congress did not modify the "take" prohibition, thereby "indicat[ing] satisfaction with the current definition of harm and its interpretation by the Secretary and the judiciary." 852 F.2d at 1109 n.6.[21]

The disruptive consequences of a circuit conflict between the District of Columbia and Ninth Circuits are especially pronounced in the present context. Because of the geographic features of the territory included within the Ninth Circuit and the species found therein, issues under the ESA arise more frequently there than in other circuits. At the same time, although the ESA does not confer any special jurisdiction on the District of Columbia Circuit, a litigant suing a federal officer (as in this case) may bring suit not only in the district where the property that is the subject of the action is situated, but also in the District of Columbia. 28 U.S.C. 1391(e)

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because it would lead to the extinction of the listed species by depriving it of its food source. The United States contended, however, that the district court had erred in holding that a "take" could result from habitat destruction that merely retards the recovery of a species. The Ninth Circuit affirmed that habitat degradation that would cause the extinction of a listed species constituted an unlawful "take." The court of appeals explicitly declined to reach the question whether habitat degradation that merely prevents recovery of an endangered species constitutes a "take." 852 F.2d 1110-1111.

[21] In fact, in *Palila I*, 639 F.2d at 498, the court of appeals had ruled that another habitat modification constituted an unlawful "take." The *Palila I* decision preceded, and was considered by Congress during deliberations on, the 1982 amendments to the ESA, as was the Fish and Wildlife Service's interpretation of the term "harm" to include habitat modification that actually kills or injures species. See *1982 House Hearings* at 273, 291, 331. *Palila I* also provided the impetus for the Secretary's rewording of the "harm" definition in 1981 to clarify that habitat modification *per se* does not constitute a take. See 46 Fed. Reg. 29,490, 29,492.

(1988 & Supp. V 1993). Accordingly, other persons who claim to be adversely affected by the Secretary's definition of "harm" may follow respondents' lead and bring an anticipatory action in the District of Columbia to take advantage of the precedent of the decision below. An enforcement action brought by the United States or in a citizen suit, on the other hand, generally must be brought in the district in which the defendant resides or the property is located. See 28 U.S.C. 1391(b) (Supp. V 1993). Thus, there is a real potential for the jurisdiction of the Ninth and D.C. Circuits to overlap with regard to activities in the circuit most affected by the "harm" regulation. This situation creates considerable uncertainty for private landowners and federal agencies, and the potential for non-uniform treatment within the Ninth Circuit.

b. The court of appeals' decision is also inconsistent with the decisions from other courts of appeals, which have recognized in the concrete context of particular applications of the "take" prohibition that a "take" of an endangered speices may result from habitat modification activities that cause harm to a species. See *American Bald Eagle* v. *Bhatti*, 9 F.3d 163 (1st Cir. 1993); *Sierra Club* v. *Yeutter*, 926 F.2d 429 (5th Cir. 1991); *Defenders of Wildlife* v. *Administrator, EPA*, 882 F.2d 1294 (8th Cir. 1989); see also *Palila I*, 639 F.2d at 497-498.

3. a. The issue in this case is one of exceptional importance. Since enactment of the ESA in 1973, the Secretary of the Interior has consistently interpreted the Act to prohibit "harm" caused by actions that significantly modify listed species' habitat to such an extent that the modification actually kills or injures the species. Although the number of prosecutions enforcing the "take" prohibition in the context of habitat-modification "harm" are relatively few, reliance on the regulation is far more prevalent than the number of prosecutions would suggest. Due to acceptance of the Secretary's interpretation, for example, numerous private parties have cooperated

in the formulation of scores of habitat conservation plans, which are a prerequisite to procurement of a Section 10 incidental take permit. See 16 U.S.C. 1539(a)(2)(A).[22]

The Secretary's "harm" regulation has also provided the impetus for (or recognition of) state and local conservation plans, which have provided the basis for developing special federal rules defining the conditions under which the "take" of a species would not be regarded as a violation of ESA Section 9.[23] Numerous other parties, including Georgia-Pacific, a large lumber company operating in the range of the red-cockaded woodpecker, have, through discussions with the Fish and Wildlife Service, modified plans to avoid all incidental takes by habitat destruction.[24] The court of appeals' decision threatens to undermine the significant protection to listed species afforded by such voluntary compliance. At the very least, the decision creates confusion for private landowners regarding the statutory requirements.

The court of appeals' decision also threatens to cause significant disruptions to federal actions. For example, the court of appeals' decision in this case provides the basis for one claim in a suit filed by environmental groups, *Seattle Audubon Soc'y* v. *Espy*, Civ. No. 92-479WD (W.D. Wash.), to challenge the final supplemental environmental impact statement concerning Forest Service and Bureau of Land Management planning doc-

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[22] See Attachment C to Federal Appellees' Response in Opposition to Motion of Sweet Home to Expedite Issuance of the Mandate (summarizing status of more than 150 habitat conservation plans submitted in connection with incidental-take permit applications).

[23] See 58 Fed. Reg. 65,088 (1993) (special rule concerning take of threatened coastal California gnatcatcher); 59 Fed. Reg. 5439 (1994) (notice of intent to prepare environmental impact statement to evaluate effects of issuance of incidental take permit that would allow private development in conjunction with conservation plan on public lands for the desert tortoise).

[24] Attachment D to Federal Appellees' Response in Opposition to Motion of Sweet Home to Expedite Issuance of the Mandate.

uments within the range of the northern spotted owl. Those documents were prepared to assess the impact of the President's proposed plan for 24 million acres of public land and to permit the lifting of the injunctions banning timber harvests on federal lands throughout the Pacific Northwest. The complaint in *Seattle Audubon Soc'y* relies on the court of appeals' ruling in this case to allege that the environmental documents are inadequate because they assume that private landowners' activities that "harm" protected species may be circumscribed. If the court of appeals' decision in this case renders that assumption incorrect, the plaintiffs assert, then insufficient federal land has been set aside for protection of listed species.

b. The prohibition against habitat modification that actually kills or injures species is a critical tool in the effort to preserve listed species. Most endangered and threatened species are at risk more often because of loss and degradation of habitat than because of any other factor. See *TVA* v. *Hill*, 437 U.S. 153, 179 (1978); Edward O. Wilson, *The Diversity of Life* 253, 346 (Belknap Press of Harv. Univ. Press 1992); Daniel J. Rohlf, *The Endangered Species Act: A Guide to its Protections and Implementation* 11 (Stan. Envtl. L. Soc'y 1989).

As Judge Silberman observed in his dissent from the order denying rehearing en banc, one can readily imagine habitat modification activities that cover a range of conduct falling within the core statutory concepts which animate the "take" definition as easily as one can imagine conduct that does not. App., *infra*, 98a. Thus, as this Court recognized in *TVA* v. *Hill*, 437 U.S. at 184 n.30, with specific reference to the definition of "harm" in the 1975 regulation, a dam project that causes the extinction of an endangered snail darter by destroying its entire habitat constitutes a "take." Similarly, the cutting of a nest tree in which an endangered species dwells and breeds

can effectively kill the bird, regardless of whether the bird is at home when the tree falls.

The Court observed in *TVA* v. *Hill*, that "[t]he plain intent of Congress in enacting [the ESA]"—"to halt and reverse the trend toward species extinction"—is reflected in the ESA's instruction to "[a]ll persons" not to "take" protected species. 437 U.S. at 184. The Secretary's interpretation of the term "harm" in the "take" prohibition to encompass significant modification or degradation of habitat that actually kills or injures protected species is supported by the text, structure and legislative history of the Act and furthers its central objectives.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1994

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 92-5255

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, ET AL., APPELLANTS

v.

BRUCE BABBITT, Secretary of the Interior, ET AL., APPELLEES

On Appeal from the United States District Court
for the District of Columbia Circuit (91cv01468)
On Appellants' Petition for Rehearing

Argued Feb. 17, 1993

Decided March 11, 1994

Rehearing and Suggestion for Rehearing
In Banc Denied May 2, 1994

Before: MIKVA, Chief Judge, WILLIAMS and SENTELLE, Circuit Judges.

Opinion for the Court filed by Circuit Judge WILLIAMS.

Concurring opinion filed by Circuit Judge SENTELLE.

Dissenting opinion filed by Chief Judge MIKVA.

STEPHEN F. WILLIAMS, Circuit Judge:

Sweet Home Chapter of Communities for a Great Oregon and a number of other organizations (collectively referred to here as "Sweet Home") sued in district court to invalidate a number of regulations promulgated by the Fish & Wildlife Service of the Interior Department under the Endangered Species Act of 1973 ("ESA" or the "Act"), 16 U.S.C. §§ 1531-44 (1988). The district court rejected all the challenges, 806 F.Supp. 279, and this court affirmed, unanimously except as to one issue. *Sweet Home Chapter v. Babbitt*, 1 F.3d 1 (D.C.Cir.1993). The issue that split the court involved the scope of the Act's prohibition of the "taking" of endangered species. On petition for rehearing, and after securing a response from the government, we alter our view on that issue.

The Act makes it a crime for any person to "take" any endangered species of fish or wildlife listed under the Act. ESA § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B). A definitional section of the Act states that "take" means

> to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

16 U.S.C. § 1532(19). The Fish & Wildlife Service ("FWS") has in turn defined the component term "harm" in such a way as to encompass any "significant" habitat modification that leads to an injury to an endangered species of wildlife:

> *Harm* in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat

> modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 CFR § 17.3.

The government contends that the Act as originally adopted in 1973 authorized this expansive definition, and that even if it did not, a 1982 amendment to another provision of the ESA, specifically § 10(a)(1)(B) of the Act, 16 U.S.C. § 1539(a)(1)(B), either so changed the context of the "take" definition as to validate the Service's definition, or at any rate ratified that definition.

On petition for rehearing, we reject both theories. We find that the Service's definition of "harm" was neither clearly authorized by Congress nor a "reasonable interpretation" of the statute, see *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43, 844, 104 S.Ct. 2778, 2781-82, 81 L.E.2d 694 (1984), and we find that no later action of Congress supplied the missing authority.

The language, structure and legislative history of the 1973 Act

The Fish & Wildlife Service found habitat modification within the idea of "harm", the most elastic of the words Congress used to define the acts that § 9 of the ESA forbids private individuals to commit. The potential breadth of the word "harm" is indisputable. In *Lucas v. South Carolina Coastal Council*, —— U.S. ——, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), for example, the Supreme Court, in exploring the just compensation requirement of the 5th Amend-

ment, observed that "the distinction between 'harm-preventing' and 'benefit-conferring' regulations is often in the eye of the beholder." *Id.* —— U.S. at — —,112 S.Ct. at 2897. As a matter of pure linguistic possibility one can easily recast any withholding of a benefit as an infliction of harm. In one sense of the word, we "harm" the people of Somalia to the extent that we refrain from providing humanitarian aid, and we harm the people of Bosnia to the extent that we fail to stop "ethnic cleansing". By the same token, it is linguistically possible to read "harm" as referring to a landowner's withholding of the benefits of a habitat that is beneficial to a species. A farmer who harvests crops or trees on which a species may depend harms it in the sense of withdrawing a benefit; if the benefit withdrawn be important, then the Service's regulation sweeps up the farmer's decision.

The immediate context of the word, however, argues strongly against any such broad reading. With the single exception of the word "harm", the words of the definition contemplate the perpetrator's direct application of force against the animal taken: "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect". The forbidden acts fit, in ordinary language, the basic model "A hit B."

For some of the words, to be sure, the application of force may not be instantaneous or immediate, and the force may not involve a bullet or blade. In the case of "pursue", the perpetrator does not necessarily catch or destroy the animal, but pursuit would always or almost always be a step toward deliberate capture or destruction, and so would be picked up by § 1532 (19)'s reference to "attempt[s]". While one may "trap" an animal without being physically present,

the perpetrator will have previously arranged for release of the energy that directly captures the animal. And one may under some circumstances "harass" an animal by aiming sound or light in its direction, but the waves and particles are themselves physical forces launched by the perpetrator. Interpreting "harass" in the Marine Mammal Protection Act, where it appears as one of the components of "take" (defined as "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal"), the 9th Circuit applied *noscitur a sociis*, saying:

> The statute groups "harass" with "hunt," "capture," and "kill" as forms of prohibited "taking." The latter three each involve direct, sustained, and significant intrusions upon the normal, life-sustaining activities of a marine mammal; killing is a direct and permanent intrusion, while hunting and capturing cause significant disruptions of a marine mammal's natural state. Consistent with these other terms, "harassment," to constitute a "taking" under the MMPA, must entail a similar level of direct and sustained intrusion.

United States v. Hayashi, 5 F.3d 1278, 1282 (9th Cir. 1993). Accordingly the court overturned the defendant's conviction. Although he had fired a rifle twice into the water behind some porpoises, he had not harassed the porpoises within the meaning of the statute, as his acts were not "direct and significant intrusions upon the mammal's ordinary activities." *Id.* Here, the nine verbs accompanying "harm" all involve a substantially direct application of force,

which the Service's concept of forbidden habitat modification altogether lacks.[1]

The implications of the Service's definition suggest its improbable relation to congressional intent. Species dependency may be very broad. One adherent of aggressive protection, for instance, notes that "[s]ome scientists believe as many as 35 million to 42 million acres of land are necessary to the survival of grizzlies", about as much land in the northern Rockies of the United States and Canada as is still usable grizzly habitat. Rocky Barker, *Saving All the Parts* 34 (1993). And for an individual to "knowingly" violate § 9 means criminal penalties of up to a $100,000 fine and imprisonment for one year. See 16 U.S.C. § 1540(b); 18 U.S.C. §§ 3559(a)(6), 3571(b) and (e) (raising the maximum penalty).

Thus the gulf between the Service's habitat modification concept of "harm" and the other words of the statutory definition, and the implications in terms of the resulting extinction of private rights, counsel application of the maxim *noscitur a sociis*. "The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307, 81 S.Ct. 1579, 1582, 6 L.Ed.2d 859 (1961). See also *Dole v. Steelworkers*,

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[1] Of course each of the terms in the "take" definition itself implies some degree of habitat modification. Setting a trap for an animal certainly modifies its habitat, as in a slightly different sense, does firing bullets at it. This obviously does not imply that habitat modifications as the Service uses the term are also encompassed.

494 U.S. 26, 36, 110 S.Ct. 929, 935, 108 L.Ed.2d 23 (1990) ("words grouped in a list should be given related meaning") (citations omitted).[2] The Service's interpretation appears to yield precisely the "unintended breadth" that use of the maxim properly prevents.

The structure and history of the Act confirm this reading. The ESA pursues its conservation purposes through three basic mechanisms: (1) a federal land acquisition program, ESA § 5, 16 U.S.C. § 1534; (2) the imposition of strict obligations on federal agencies to avoid adverse impacts on endangered species, ESA § 7, 16 U.S.C. § 1536; and (3) a prohibition on the taking of endangered species by anybody, ESA § 9, 16 U.S.C. § 1538. The Act addresses habitat preservation in two ways—the federal land acquisition program and the directive to federal agencies to avoid adverse impacts. The latter frames the duty in terms that the Service has now transposed to the private anti-"take" provision: every such agency is to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in *the destruction or adverse modification of habitat* of such species which is determined . . . to be critical", unless an exemption is granted. 16 U.S.C. § 1536(a)(2) (emphasis added). Thus, on a specific segment of society, the

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[2] "One hardly need rely on such Latin phrases as *ejusdem generis* and *noscitur a sociis* to reach this obvious conclusion [that "words grouped in a list should be given related meaning"]." *Third National Bank v. Impac Limited, Inc.*, 432 U.S. 312, 322 n. 16, 97 S.Ct. 2307, 2313 n. 16, 53 L.Ed.2d 368 (1977) (internal quotations omitted).

federal government, the Act imposes very broad burdens, including the avoidance of adverse habitat modifications; on a broad segment, every person, it imposes relatively narrow ones.

The legislative history reflects this balance, and confirms the intention to assign the primary task of habitat preservation to the government. Explaining the land acquisition program, Senator Tunney, the Senate floor manager for the ESA, stated: "Through these land acquisition provisions, we will be able to conserve habitats necessary to protect fish and wildlife from further destruction." 119 Cong.Rec. 25669 (July 24, 1973). Representative Sullivan, the floor manager for H.R. 37—the House version of the bill—confirmed this approach:

> For the most part, the principal threat to animals stems from the destruction of their habitat. The destruction may be intentional, as would be the case in clearing of fields and forests for development of resource extraction, or it may be unintentional, as in the case of the spread of pesticides beyond their target area. Whether it is intentional or not, however, the result is unfortunate for the species of animals that depend on that habitat, most of whom are already living on the edge of survival. *H.R. 37 will meet this problem by providing funds for acquisition of critical habitat through the use of the land and water conservation fund.* It will also enable the Department of Agriculture to cooperate with *willing landowners* who desire to assist in the protection of endangered species, but who are understandably unwilling to do so at excessive cost to themselves.

119 Cong.Rec. 30162 (Sept. 18, 1973) (emphasis added). For habitat modification, then, Representative Sullivan saw the Act as providing duties for the government, with private persons acting only in the form of "willing landowners" assisted by the Department of Agriculture.

The floor managers differentiated loss of habitat from the hazard that was the target of the "taking" ban and the other prohibitions of § 9. After the passage quoted, Representative Sullivan went on to identify "[*a*]*nother* hazard to endangered species" which "arises from those who would capture or kill them for pleasure or profit. There is no way that the Congress can make it less pleasurable for a person to *take* an animal, but we can certainly make it less profitable for them to do so." *Id.* (emphasis added). Senator Tunney drew the same line:

> Although most endangered species are threatened primarily by the destruction of their natural habitats, a significant portion of these animals are subject to *predation by man for commercial, sport, consumption, or other purposes.* The provisions in S. 1983 would prohibit the commerce in or the importation, exportation, or taking of endangered species except where permitted by the Secretary.

119 Cong.Rec. 25669 (July 24, 1973) (emphasis added).

Congress's deliberate deletion of habitat modification from the definition of "take" strengthens our conclusion. As introduced before the Senate Commerce Committee, S. 1983 defined "take" as including "the destruction, modification, or curtailment of [a

species'] habitat or range." Endangered Species Act of 1973: Hearings on S. 1592 and S. 1983 Before the Subcomm. on Environment of the Senate Comm. on Commerce, 93d Cong., 1st Sess., at 27 (1973). A number of persons appearing before the Subcommittee on Environment explicitly endorsed this language and stressed its importance. See, e.g., testimony of John Grandy of the National Parks and Conservation Association, *id.* at 86; testimony of Tom Garrett, Wildlife Director of Friends of the Earth, *id.* at 104. Senators made the same point. See statement of Senator Moss, *id.* at 113; statement of Senator Williams, *id.* at 116. But the "take" definition of the version of S. 1983 submitted to the Senate omitted any reference to habitat modification, defining "take" to mean "harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." See 119 Cong. Rec. 25663 (July 24, 1973). In rejecting the Service's understanding of "take" to encompass habitat modification, "we are mindful that Congress had before it, but failed to pass, just such a scheme." *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, —— U.S. ——, ——, 114 S.Ct. 517, 526, 126 L.Ed.2d 524 (1993).

The effect of the 1982 amendments

Congress amended the Act in 1982, with two possible implications. First, one might argue that one of the amendments so altered the *context* of the definition of "take" as to render the Service's interpretation reasonable, or even, conceivably, to reflect express congressional adoption of that view. Second, one might argue that the process of amendment, which brought the Service's regulation and a judicial

endorsement to the attention of a congressional subcommittee, constituted a ratification of the regulation. We reject both theories.

1. The only legislative *act* from which the government claims support is the addition of ESA § 10(a)(1)(B), 16 U.S.C. § 1539(a)(1)(B), which authorizes the FWS to issue permits for "any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." This language clearly implies that *some* prohibited takings are "incidental" to otherwise lawful activities. It does not follow, however, that such incidental takings include the habitat modifications embraced by the Service's definition of "harm". Harms involving the direct applications of force that characterize the nine other verbs of § 1532(19) pose the problem of incidental takings. The trapping of a non-endangered animal, for example, may incidentally trap an endangered species.

In fact, the key example of the sort of problem to be corrected by § 10(a)(1)(B) involved the *immediate destruction* of animals that would be *trapped* by a human enterprise. Northeast Utilities reported that it had sought to construct a nuclear plant on the Connecticut River. Dr. John P. Cagnetta explained on behalf of Northeast that the "EPA had concluded that Section 9 of the Act constituted a '*zero* taking' rule which would prohibit the *entrainment or impingement* of *any* Shortnose Sturgeon eggs, larvae or adults by the Montague intake structure." Endangered Species Act of 1973: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries ("Hearings"),

97th Cong., 2d Sess., at 358 (1982) (emphasis added). The "entrainment" and "impingement" of sturgeon eggs involve the crushing or capture of the eggs as a direct result of a human enterprise, just as would nets that catch fish driven in their way by the tides.

The sort of advance conservation plan authorized by § 10(a) makes complete sense for the kind of incidental taking exemplified by Northeast's dilemma. Dr. Cagnetta expressed concern that after the firm had invested $2 billion in the proposed plant, it might be subject to closure by injunction granted at the behest of a private person. *Id.* at 359. Section 10(a) provides procedural means by which to improve the trade-off between protecting endangered species and permitting normal development. Firms whose activities might incidentally "take" members of an endangered species can get *advance* protection from legal liability, but only if they convince the Secretary that the plan uses the maximum devices possible to mitigate and minimize species loss, and that the resulting losses will not unduly harm the species. See § 10(a)(2)(B)(ii) & (iv), 16 U.S.C. § 1539(a)(2)(B)(ii) & (iv).

Thus, adoption of § 10(a)'s permit plan, at least as evidenced by Northeast's instigating role, arose from interpretive assumptions about the meaning of "taking"—namely the EPA's views (1) that the perpetrator need not have *intended* to take the creature in question, and (2) that even the slightest taking would violate the Act (the "zero taking rule"). We need not explore the possible impact of these assumptions on the interpretation of "take"; a member of Congress might have supported the permit system on a completely agnostic premise about those interpretations: "There are some pretty wild inter-

pretations out there, and they may stick; if they do, it would certainly be helpful to have a mechanism for softening their impact." Normally, erroneous legislative assumptions about the meaning of an existing statute, even when they serve as the premise of an amendment, do not alter the meaning of unamended provisions. See *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 840, 108 S.Ct. 2182, 2191, 100 L.Ed.2d 836 (1988). Here, however, the matter is even easier, as the amendment involved no assumptions supporting the Service's position on habitat modification. So far the creation of the permit plan is concerned, the implicit assumptions simply do not embrace the idea that "take" included any significant habitat modification injurious to wildlife.

2. For its ratification theory, the government invokes (besides the § 10(a)(2) amendment itself) (a) language in the Conference on the 1982 amendments; (b) notice to a House subcommittee of the Service's habitat modification regulation and of a decision upholding it; and (c) the decision of a senator *not* to offer an amendment. We first examine these and then consider the cases on ratification of mistaken interpretations, on the basis of congressional awareness and peripheral action.

(a) *The Conference Report.* The government highlights some observations of H.R.Rep. No. 835, 97th Cong., 2d Sess. (1982) ("Conference Report"), 1982 U.S.C.C.A.N. 2807, speaking of the innovation made by § 10(a):

> This provision is modeled after a *habitat conservation plan* that has been developed by three Northern California cities, the County of San Mateo, and private landowners and developers

> to provide for the conservation of the habitat of three endangered species and other unlisted species of concern within the San Bruno Mountain area of San Mateo County.
>
> This provision will measurably reduce conflicts under the Act and will provide the institutional framework to permit cooperation between the public and private sectors in the interest of endangered species and *habitat conservation.*
>
> The terms of this provision require a unique partnership between the public and private sectors in the interest of species and *habitat conservation.* . . .

Id. at 30-31, *reprinted in* 1982 U.S.C.C.A.N. 2871-72 (emphasis added).

Although the passage thrice uses the phrase "habitat conservation," the first reference simply describes the particular plan on which the provision was modeled, while the second and third couple the phrase with, respectively, "the interest of endangered species" and "the interest of species." The focus is on the flexibility of the *relief* offered. The expectation that *relief* under the § 10(a) permit scheme would include habitat conservation does not imply an assumption that *takings* encompass habitat modification. Thus, if a nuclear plant will "entrain" and "impinge" sturgeon eggs, the area where this occurs will certainly not be hospitable for the sturgeon, and mitigation measures invited by § 10(a) might well include provision of alternative habitat. Similarly, although § 10(a) relief contemplates advancing "the interest of endangered species," it does not follow that every act detrimental to an endangered species constitutes a forbidden taking.

(b) *Notice of the regulation.* The Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries had notice of the regulation. See, e.g., Hearings at 290. In addition, speakers brought a decision of the 9th Circuit upholding the application of the ESA to habitat modification, *Palila v. Hawaii Dep't of Land & Natural Resources*, 639 F.2d 495 (9th Cir.1981), to the attention of subcommittee members in attendance. See Hearings at 329, 331. See also *id.* at 331, 426 (expressions of conflicting views on validity of interpretation of "harm" to encompass habitat modification). So far as appears, no congressional awareness of the Service's regulation or of *Palila* reached the floor of either House.

(c) *The withdrawn amendment.* The government says that Senator Garn proposed an amendment to change the definition of "take" but withdrew it voluntarily because he realized it did not have enough support for passage." Appellee Brief at 32. This falsely suggests a focus on "habitat modification" that was simply not there. In fact, the amendment that Senator Garn withdrew was not an isolated redefinition of the term "take," but a wholesale "rewrite" of the ESA[3]—the reading of which was

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[3] Senator Garn's proposed amendment included the following redefinition:

> The term "take" means purposefully to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct which is inimical to the continued existence of an endangered or threatened species. It does not include effects from

dispensed with on the Senate floor, and the text of which took 16 dense pages of legislative history. *A Legislative History of the Endangered Species Act of 1973, As Amended in 1976, 1977, 1978, 1979, and 1980* (U.S.Govt.1982) at 1080. The record reveals nothing to suggest any relation between Senator Garn's decision and congressional sentiment on the habitat modification issue.

By what standard are these features of the 1982 amendment process to be evaluated? Although the precedents are hardly in perfect harmony, the Supreme Court has generally refused to infer ratification from mere amendment of adjacent clauses in these circumstances. It has forcefully articulated reasons for this refusal. In *Girouard v. United States*, 328 U.S. 61, 66 S.Ct. 826, 90 L.Ed 1084 (1946), the Court concluded that it had erred in three prior cases holding that an alien who refused to bear arms could not be admitted to citizenship under the terms of the oath prescribed by Congress for naturalization. *Id.* at 61-69, 66 S.Ct. at 826-830. It then confronted a claim that Congress had impliedly adopted the rule of the earlier decisions, a claim to which the facts lent considerable support—*unsuccessful* efforts to change the rule, plus *reenactment* of the underlying language amid *change* of many related provisions. *Id.* at 69, 66 S.Ct. at 829 (emphasis added).

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normal forestry, farming, ranching, or water management practices.

A Legislative History of the Endangered Species Act of 1973, As Amended in 1976, 1977, 1978, 1979, and 1980 (U.S. Govt.1982) at 1082.

In dissent, Chief Justice Stone set out the principle that where a statutory provision has been subject to a controversial construction, reenactment without change implies congressional approval of that construction. *Id.* at 76, 66 S.Ct. at 833 (Stone, C.J., dissenting). The court, however, rejected this approach, and warned "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Id.* at 69, 66 S.Ct. at 830. It observed that congressional silence and inaction—actually, reenactment of the pertinent language—were "as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule as [the prior] cases." *Id.* at 70, 66 S.Ct. at 830.

Similarly, where Congress adopts amendments on the basis of misconception as to the meaning of a prior statute's related provisions, the later act does not turn the misconception into law. *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988), illustrates the principle. As originally enacted, the Employee Retirement Income Security Act ("ERISA") preempted state laws "as they may now or hereafter relate to any employee benefit plan" covered by the statute. ERISA § 514(a), 29 U.S.C. § 1144(a). After a number of lower courts construed § 514(a) to preempt state garnishment statutes, Congress in 1984 expanded the statutory list of exceptions to § 514(a), adding garnishments in support of domestic relations orders and thereby expressly eliminating ERISA's preemption of that narrow category. See ERISA § 514(b)(7), 29 U.S.C. § 1144(b)(7). Though the Court recognized that language in the House Committee report "suggest[ed] that the House

Committee in 1984 thought that § 514(a) foreclosed state-law attachment orders akin to those at issue here," *id.* at 840, 108 S.Ct. at 2191, i.e., garnishments outside the area of domestic relations, it refused to attach weight to that implicit suggestion. Rather, the Court said that "these views—absent an amendment to the original language of the section—do not direct our resolution of this case. Instead, we must look at the language of ERISA and its structure, to determine the intent of the Congress that originally enacted the provision in question. 'It is the intent of the Congress that enacted [the section] . . . that controls.' *Teamsters v. United States*, 431 U.S. 324, 354, n.39, 97 S.Ct. 1843, 1864 n. 39, 52 L.Ed.2d 396 (1977)." *Id.*

And in *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987), the Supreme Court refused to find implied ratification even though Congress amended closely related statutory sections and the Conference Report appeared to support the prevailing interpretation. The Court had, in *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953), construed certain provisions of the Securities Act of 1983 to bar enforcement of pre-dispute agreements to arbitrate for disputes under §12(2) of that act, despite the broad endorsement of arbitration in the previously adopted Federal Arbitration Act, 9 U.S.C. § 1 et seq. The issue in *Shearson/American Express* was whether similar provisions in the Securities Exchange Act of 1934 prevented enforcement of a pre-dispute arbitration agreement as to an alleged violation of § 10(b) of that Act, as the circuit courts of appeal had generally held.

After finding that the 1934 Act as originally enacted created no exception to the Arbitration Act, the Court turned to whether a later congressional intervention, the 1975 amendments to both the 1933 and the 1934 Acts—"the 'most substantial and significant revision of this country's Federal securities laws since the passage of the Securities Exchange Act in 1934' ", *Shearson/American Express*, 482 U.S. at 246, 107 S.Ct. at 2347 (Blackmun, J., dissenting)—altered that result. The 1975 amendments included a change in a section of the 1934 Act (§ 28(b)) closely related to those sections from which lower courts had drawn the inference against pre-dispute arbitration clauses, and the Conference Report had in connection with that change virtually endorsed *Wilko v. Swan*:

> It was the clear understanding of the conferees that this amendment did not change existing law, as articulated in *Wilko v. Swan*, 346 U.S. 427 [74 S.Ct. 182, 98 L.Ed. 168] (1953), concerning the effect of arbitration proceedings provisions in agreements entered into by persons dealing with members and participants of self-regulatory organizations.

H.R.Conf.Rep. No. 94-229 at 111 (1975), 1975 U.S.C.C.A.N pp. 179, 342 (1975) (quoted at *Shearson/American Express*, 482 U.S. at 236-37, 107 S.Ct. at 2343).

To Justice Blackmun, dissenting for himself and Justices Brennan and Marshall, this showed that Congress was clearly aware of the extension of *Wilko* to the 1934 Act and, at a minimum, that it was "not concerned with arresting this trend." 482 U.S. at 247, 107 S.Ct. at 2348. But the majority, although

finding some ambiguities in the remarks of the Conference Report, stressed the absence of any affirmative action by Congress in regard to the controlling sections: "We cannot see how Congress could extend *Wilko* to the [1934] Act without enacting into law any provision remotely addressing that subject." *Id.* at 237, 107 S.Ct. at 2343.

A variant on this theme is *TVA v. Hill*, 437 U.S. 153, 98 S.Ct. at 2279, 57 L.Ed.2d 117 (1978), involving claims that Congress's several appropriations for the Tellico Dam, made with full awareness of its risks to the snail darter and with express statements in various House and Senate Appropriations Committees' reports that the ESA was not meant to apply to this project, effectively exempted the dam from § 7 of the Act. Despite Congress's endorsement of the disputed project with the ultimate accolade—hard cash —the Court refused to find any exemption. *Id.* at 189-93, 98 S.Ct. at 2299-2301. The Court underscored the proposition that only congressional *committees* had expressed the understanding of § 7 that contradicted the Court's reading. *Id.* at 189, 193, 98 S.Ct. at 2299, 2301.

Our own decision in *State of Ohio v. U.S. Department of the Interior*, 880 F.2d 432 (D.C.Cir.1989), elaborates on the jurisprudential concerns raised by *Shearson/American Express*. The Court considered a situation where Congress had amended the key sections being construed *and* had reenacted the entire statute. Judge Ward wrote for the court:

> Were we to infer congressional approval of Interior's rules because it did not amend the statute to explicitly repudiate them, we would in effect be insisting that a Congress legislatively reiter-

> ate an already clear statutory command in order to fend off an impermissible interpretation. As we all know, many statutes are on the books for which no congressional majority could presently be garnered *either* to reenact *or* to repeal, yet those acts continue as valid law; indeed, a canon of equal worth with the acquiescence-by-reenactment rule is the one disfavoring repeal by implication. We conclude that the acquiescence-by-reenactment rule is not applicable to a situation where the regulations violate the original statutory language and where Congress' decision not to amend the relevant statutory provisions evidently stems from a belief that the provisions have been clear all along.

Id. at 458-59. Although the court evidently understood congressional inaction to stem from a belief that the statute had been "clear all along" (*against* the administrative interpretation), the ambiguity we pinpointed is relevant more broadly. Congressional inaction may indicate no more than the press of other business. As inaction is inadequate to *repeal* a law, it should be inadequate to *modify* a law. Yet modification is required to sustain an interpretation that is invalid as against the original legislation. Professor Tribe has pointed out that judicial reliance on congressional silence generates an elaborate buck-passing. The courts pass the buck to Congress by invoking the congressional inaction, and individual members of Congress can freely pass the buck back by pointing to the court's action. See Laurence H. Tribe, *Constitutional Choices* 33-34 (1985).

We do not pretend that the Court's treatment of this issue has been absolutely uniform. There are

cases indicating some readiness to infer ratification merely from amendment of related provisions (coupled with acute congressional focus on outstanding interpretation), and even from mere notice followed by inaction. In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985), for example, the Court considered the Corps of Engineers' broad reading of "waters of the United States" in the 1972 Clean Water Act, and placed some weight on Congress's 1977 failure—in the course of making important amendments and after extensive floor debate—to modify the Corp's interpretation. "Although we are chary of attributing significance to Congress' failure to act, a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it." *Id.* at 137, 106 S.Ct. at 464. In *Bob Jones University v. United States*, 461 U.S. 574, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983), the Court attached weight to the fact of Congress's awareness of IRS rulings that barred tax-exempt status for racially discriminatory schools, noting that 13 bills had been introduced over the years to overturn the rulings, none ever emerging from committee. *Id.* at 600, 103 S.Ct. at 2033. But the Court also observed that "[n]onaction by Congress is not often a useful guide". *Id.* More important, perhaps, Congress itself had, over the same period, adopted antidiscrimination prerequisites for private club exemptions, a closely parallel issue with obvious implications for the meaning of the general language exempting

charitable and educational institutions. *Id.* at 601-02, 103 S.Ct. at 2033-34. And in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986), the Court broadly suggested that congressional "revisit[ations]" of a statute after a longstanding administrative interpretation, coupled with failure to modify the interpretation suggested support for the agency view. *Id.* at 846, 106 S.Ct. at 3254. But in *Schor* the Court found the rejected reading of the statute inconsistent with the statutory language, *id.* at 841-42, 106 S.Ct. at 3251-52, and fraught with incongruities, see *id.* at 843-44, 106 S.Ct. at 3252-53, and also read the later amendments as "explicitly affirm[ing]" the agency's view, *id.* at 846, 106 S.Ct. at 3254.

These cases may ultimately not be fully reconcilable. We note, however, that the cases drawing inferences from inaction typically fail to address the serious jurisprudential problems of doing so—especially those captured in Judge Wald's observation that there are plenty of statutes "on the books for which no congressional majority could presently be garnered *either* to reenact *or* to repeal". *State of Ohio*, 880 F.2d at 458. It hardly seems consistent to enforce such statutes yet to accept non-amendment of an interpretation as the equivalent of congressional endorsement.

If the 1982 Congress had *reenacted* the pertinent sections of the ESA *and* "voice[d] its approval" of the FWS's interpretation, it might be appropriate to treat the reenactment as an adoption of that interpretation. *United States v. Bd. of Commissioners*, 435 U.S. 110, 134, 98 S.Ct. 965, 980, 55 L.Ed.2d 148 (1978). But see *Girouard*. Here, however, Congress

neither reenacted the sections having to do with "take", nor "voiced its approval" of the harm regulation. As we have seen, its creation of the permit scheme is fully consistent with the meaning of "take" as enacted in 1973; the other developments show no more than awareness of the Service's view, its survival in *Palila*, and the absence of any action to endorse or repudiate those developments.

* * * *

Accordingly, we hold invalid the Fish & Wildlife Service regulation defining "harm" to embrace habitat modifications. The judgment of the district court is reversed to that extent; otherwise, the judgment of this court in *Sweet Home Chapter v. Babbitt*, 1 F.3d 1 (D.C.Cir.1993), is unaltered.

So ordered.

SENTELLE, Circuit Judge concurring:

As I remain of the view expressed in my dissent in the original version of this case, *Sweet Home Chapter v. Babbitt*, 1 F.3d 1, 11 (D.C.Cir.1993) (Sentelle, dissenting), that the word "harm" in the context of the definition of "taking" in the Endangered Species Act of 1973 cannot reasonably be defined to include the broadly prohibited habitat modification encompassed in the challenged regulation, I am most pleased to concur in the decision of the Court. Now as then I find the words and structure of the Act sufficiently clear as to require no resort to legislative history. I therefore join with enthusiasm those portions of Judge Williams' opinion that rely on the structure of the Act and on the maxim of *noscitur a sociis*. I further note, as I did in my earlier dissent, that to define "harm" as broadly as does the Secretary is to render all other words in the statutory definition of "taking" superfluous in violation of the presumption against surplusage: "[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." 1 F.3d at 13 (quoting *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 837, 108 S.Ct. 2182, 2189, 100, L.Ed.2d 836 (1988)).

In view of the language and structure of the Act, and the principles of construction applied by Judge Williams and in my earlier dissent, I do not find it necessary to rely on the legislative history incorporated in Judge Williams's opinion. "[A]ppeals to statutory history are well taken only to resolve statutory ambiguity." *Barnhill v. Johnson*, —— U.S. ——, ——, 112 S.Ct. 1386, 1391, 118 L.Ed.2d 39 (1992) (internal quotation omitted). As the Su-

preme Court recently observed, "we do not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, —— U.S. ——, ——, 114 S.Ct. 655, 662, 126 L.Ed.2d 615 (1994). Because I find the meaning of "take" in the statute to be sufficiently clear that "I cannot cram the agency's huge regulatory definition" into any "tiny crack of ambiguity Congress left," 1 F.3d at 12. I concur in the decision to reverse the District Court judgment in part, but I would do so without resort to the legislative history.

MIKVA, Chief Judge, dissenting:

The majority's decision in this case is unfortunate. It scuttles a carefully conceived Fish and Wildlife Service ("FWS") regulation and creates a split in the circuits on an important statutory question. Despite the significance of the issue presented in this case, the majority insists on granting rehearing and reversing its earlier opinion without the benefit of additional oral argument, and without the benefit of additional briefing tailored to the court's concerns. What was rightly considered good law in the opinion in this case issued last year, published at 1 F.3d 1 (D.C.Cir.1993), is now "altered" on the basis of a confusing and misguided legal analysis that creates a needless conflict among the circuits. I dissent.

A. Standard of Review

The majority's first, and biggest, mistake is to jettison the *Chevron* standard. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Only once does the majority mention *Chevron*, conceding that it is supposed to govern our review of this case. But the majority concludes that the FWS's regulation is infirm under *Chevron* because "the Service's definition of 'harm' was neither clearly authorized by Congress nor a 'reasonable interpretation' of the statute." Maj. op. at 1464.

But the standard of review that we are bound to apply under *Chevron* actually reads as follows:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the

> question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43, 104 S.Ct. at 2781-82 (footnotes omitted).

Plainly, *Chevron* does not place the burden on the responsible agency to show that its interpretation is clearly authorized or reasonable. On the contrary, the burden is on the party seeking to overturn such an interpretation to show that Congress has clearly spoken *to the contrary*, or that the agency's interpretation is *un* reasonable. The whole point of *Chevron* deference is that when Congress has *not* given a clear command, we presume that it has accorded discretion to the agency to clarify any ambiguities in the statute it administers. In requiring the agency to justify its regulation by reference to such a clear command, the majority confounds its role. Ties are supposed to go to the dealer under *Chevron*.

Along with (and perhaps because of) this backwards reading, the majority also fails to note which step of *Chevron* is dispositive of the case. If it is step

one, the majority must show that Congress has "directly spoken to the precise question at issue": whether the word "harm" includes "significant habitat modification [that] actually kills or injures wildlife." Surely the statute is silent, or at best ambiguous, on this question. The Endangered Species Act ("ESA") nowhere defines "harm," and nowhere specifically prohibits the extension of that term to habitat modification. Under step two, the only question is whether the FWS's interpretation of the word "harm" constitutes a "permissible" reading of the ambiguous language. The question is *not*—however much the majority might like it to be—whether we think it constitutes the best reading. Under step two, "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, *or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.*" *Chevron*, 467 U.S. at 843 n. 11, 104 S.Ct. at 2782 n. 11 (emphasis added).

B. Applying Chevron

Despite the command of *Chevron*, the majority substitutes its own favorite reading of the Endangered Species Act for that of the agency. But *Chevron* makes it irrelevant whether the majority's preferred interpretation is better than the agency's; the only question is the reasonableness of the agency's interpretation. And a fair reading allows for no other conclusion than that the agency's interpretation is reasonable.

The place to start is the statutory language. The ESA makes it unlawful to "take" a member of a species of fish or wildlife designated as "endangered"

by the FWS. 16 U.S.C. § 1538(a)(1)(B). "Take" is a defined term, meaning "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The regulation at issue in this case purports to define the term "harm" as "an act which actually kills or injuries wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife. . . ." 50 C.F.R. § 17.3. It is this definition that the majority finds unreasonable.

The majority relies primarily upon *noscitur a sociis*, a seldom-invoked principle of statutory construction. According to this canon, when a potentially broad word appears in a definition along with a list of narrow words, the broad word should be read narrowly to conform with its companions. This the majority purports to do here, finding that all the words in the definition of "take," other than the crucial word "harm," involve a "direct application of force." Ipso facto, the word "harm" must also be read to require a direct application of force, and habitat modification is not sufficiently direct to fall within this definition of "harm."

To this display of reasoning by the majority, one is tempted to respond, "Watch that first step; it's a big one." The definition of "take" does not conform to the paradigm of one broad word alongside many narrow ones, and thus the majority's decision to apply *noscitur a sociis* is fatally flawed. Instead, "take" includes several words that might be read as broadly, or nearly as broadly, as "harm": especially "harass," "wound," and "kill." Indeed, as the regulation at issue defines "harm" as an act (including habitat modification) that "actually kills or injures wildlife,"

the FWS might as easily have derived a proscription of habitat modification from the words "kill," "wound," and "harass," as from the word "harm."

In fact, the House Report specifically comments upon the breadth of the ESA's prohibition of "harassment," stating:

> ["Take"] includes harassment, whether intentional or not. This would allow, for example, the Secretary to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young.

H.R.Rep. No. 93-412, 93rd Cong. 1st Sess. 11 (1973). Accordingly, FWS has defined the term "harass" nearly as broadly as the term "harm":

> *Harass* in the definition of "take" in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering.

50 C.F.R. § 17.3. Appellants have not challenged this definition.

A more limited definition of "harass" was required (if at all) in *United States v. Hayashi*, 5 F.3d 1278 (9th Cir.1983), only because the word "harm" does not appear alongside "harass" in the Marine Mammal Protection Act; the only accompanying terms are "hunt," "capture," and "kill." 16 U.S.C. § 1362(13). By contrast, the ESA also includes the more expansive "harm," "wound," and "pursue," and is clearly meant to proscribe a broader range of activity. The

9th Circuit, the same court that decided *Hayashi*, has itself reached that conclusion, *Palila v. Hawaii Dep't of Land and Natural Resources*, 852 F.2d 1106, 1107-09 (9th Cir. 1988) (agency's interpretation of "harm" to include significant habitat modification is consistent with the language, purpose, and legislative history of the ESA), and today's contrary decision thus creates a foolish circuit conflict.

Noscitur a sociis means that a word is known by the company it keeps. *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307, 81 S.Ct. 1579, 1582, 6 L.Ed.2d 859 (1961). In the definition of "take," the term "harm" is accompanied by an assortment of words ranging from the precise and narrow "shoot" to the vague and expansive "harass." Gratuitous references to our nation's foreign policy aside, *see* Maj. Op. at 1464, "harm" is not a single elastic word among many ironclad ones but an ambiguous term surrounded by other ambiguous terms. Consequently, even if it is ever appropriate to measure an agency's construction of a statute against a seldom-used and indeterminate principle of statutory construction, this is not the place for *noscitur a sociis*.

Equally inappropriate is Judge Sentelle's use of the presumption against surplusage. There is no reasonable definition of the word "harm" (or, for that matter, the word "harass") that would not render superfluous some of the other defined terms. For example, one cannot "kill" or "wound" an animal without also "harming" it, even under the narrowest conceivable interpretation of "harm." Does that mean we must read "harm" out of the statute altogether? That would hardly be faithful to Congress's intent, which was to define takings "in the broadest possible

manner to include any conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." S.Rep. No. 93-307, 93rd Cong., 1st Sess. 7 (1973), 1973 U.S.C.C.A.N pp. 2989, 2995. No, instead it means we must uphold the agency's reasonable accommodation of all the statutory terms. Defining "harm" to include "significant habitat modification" renders no more terms superfluous than would a definition that did not include habitat modification but did include "direct" forms of killing and wounding. And indeed, the majority's holding that "harm" cannot include indirect means of injuring wildlife may render "harm" itself superfluous, or nearly so, as "direct" means of injury are well covered by the other terms. The plain language of the statute, then, lends no support to the majority's contention that the FWS's interpretation of "harm" is impermissible.

The statute's purpose and legislative history provide equally insufficient grounds for rejecting the agency's interpretation. The majority, adopting the view of the appellants in this case, acknowledges that Congress intended to halt injurious habitat modification when it passed the ESA. It contends that Congress intended to combat this problem solely through § 1534's provision for federal land acquisition, and not through § 1538's prohibition of private takings.

According to the majority, the legislative history of the "take" provision establishes that Congress did not mean for that term to encompass habitat modification. It notes that the original bill that was referred to the Senate Committee on Commerce, S. 1983, defined "take" to include "destruction, modification, or curtailment of [an endangered species'] habitat or range." S. 1983, 93rd Cong., 1st Sess. § 3

(6) (1973). The bill reported out of committee, however, did not refer to habitat modification in the definition of "take." This omission, the majority finds, evinces Congress's intent not to include habitat modification within the scope of protected "takings." The majority also points to several statements from the floor suggesting that some members of Congress may have wanted land acquisition, not the prohibition of land uses, to be the ESA's sole weapon against habitat modification on private lands.

I find the legislative history to be most ambiguous regarding whether Congress intended to include habitat modification within the meaning of "take." It is true that the Senate Committee chose not to use the S. 1983 definition of "take," which specifically encompassed habitat modification. Instead, the Committee adopted a definition from the other bill under consideration, S. 1592, which did not explicitly include habitat modification. But as the district court noted, there is no indication in the legislative history as to why the Committee selected one definition over the other. And, in any event, the crucial ward "harm" was never voted on by the Committee but was added later on the floor of the Senate. It might well have been intended to cover the entire landscape originally contemplated by the S. 1983 definition. *See* 119 Cong. Rec. 25,683 (July 24, 1973) (Statement of Sen. Tunney) ("The amendments will help to achieve the purposes of the bill and will clarify some confusion caused by language remaining in the bill from earlier drafts or omitted from earlier drafts which went unnoticed during the final committee markup.").

Most importantly for our *Chevron* inquiry, there is nothing to suggest that Congress chose the definition

it did in order to *exclude* habitat modification. The Committtee may have rejected the S. 1983 definition only because it apparently would have made habitat modification a *per se* violation of the ESA, as opposed to leaving such determinations to the discretion of the responsible agency whose judgment this court today casts aside. Surely there is nothing to indicate that the Committee intended to foreclose an administrative regulation prohibiting habitat modification—particularly a prohibition accompanied by limitations, such as those contained in the FWS regulation under review, requiring that there be actual injury or death to wildlife.

In any case, Congress manifested no clear intent to exclude habitat modification from the "take" definition. Indeed, the Senate Committee Report states " 'Take' is defined . . . in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." S. Rep. No. 93-307, 93rd Cong., 1 Sess. 7 (1973), 1973 U.S.C.C.A.N. p. 2995. And, as I have noted above, the bill reported out of Committee did not even include the word "harm" in the definition of "take." That was added later on the floor, in a "technical and clarifying amendment[]." 119 Cong.Rec. 25,682-83 (July 24, 1973) (Statement of Sen. Tunney). As the amendment added the word "harm," while subtracting nothing, that amendment can only have broadened the definition from the bill reported out of Committee —"clarifying" that "take" should be defined "in the broadest possible manner."

The contention that Congress intended land acquisition to be the exclusive instrument for curbing habitat modification on private lands is totally speculative. Nothing in the language of 16 U.S.C. § 1534 or in the

legislative history proves this sweeping assertion. The only evidence the majority can garner in support of its proposition is a few isolated and ambiguous remarks by members of Congress on the floor. *See* 119 Cong.Rec. 25,669 (July 24, 1973) (Statement of Sen. Tunney); 119 Cong.Rec. 30,162 (Sept. 18, 1973) (Statement of Rep. Sullivan). The general rule is that "debates in Congress expressive of the views and motives of individual members are not a safe guide . . . in ascertaining the meaning and purpose of the law-making body." *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474, 41 S.Ct. 172, 179, 65 L.Ed. 349 (1921). In any case, these statements do not establish that even the speakers themselves intended land acquisition to be the *exclusive* protective mechanism for habitats on private lands.

In sum, the majority has found nothing in the language, structure, purpose, or legislative history that unambiguously shows that "harm" does not encompass habitat modification. Under *Chevron*, that should dispose of the case: the FWS's gap-filling measure is a permissible exercise of its discretion as delegated by Congress. Moreover, not only is the majority's evidence ambiguous, but there is additional evidence supporting the *agency's* interpretation. I have already cited the Senate and House Committee Reports, which suggest that Congress envisioned a broad interpretation of "take," even before the crucial word "harm" was added to the definition of that term. S.Rep. No. 93-307, 93rd Cong., 1st Sess. 7 (1973) U.S.C.C.A.N. p. 2995 (" 'Take' is defined . . . in the broadest possible manner."); H.R.Rep. No. 93-412, 93rd Cong., 1st Sess. 15 (1973) (ESA "includes, in the broadest possible terms, restrictions on the taking,

importation and exportation, and transportation of [endangered] species, as well as other specified acts"); *id.* at 11 ("Harass" includes activities of bird-watchers "where the effects of those activities might disturb the birds and make it difficult for them to hatch or raise their young."). And I have adverted to the floor amendment that added the word "harm," purportedly to "clarify" language that was "omitted" from the draft that emerged from Committee. 119 Cong.Rec. 25,683 (July 24, 1973) (Statement of Sen. Tunney).

In addition, the agency's interpretation draws support from a subsequent amendment to the ESA. In 1982, Congress amended the ESA to include a provision authorizing the FWS to issue a permit allowing "any taking otherwise prohibited by section 1538 (a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B). By negative inference, this provision demonstrates that Congress thought at least some "incidental takings" must be prohibited by § 1538(a)(1)(B) in the first instance. The majority speculates on what Congress could have meant by "incidental takings," but the evidence quite clearly suggests that Congress meant habitat modification. The House Report states,

> This provision is modeled after a habitat conservation plan that has been developed by three Northern California cities, the County of San Mateo, and private landowners and developers to provide for the conservation of the habitat of three endangered species. . . .

> This provision will . . . provide the institutional framework to permit cooperation between the public and private sectors in the interest of endangered species and habitat conservation.

H.R.Rep. No. 97-835, 97th Cong., 2d Sess. 30-31 (1982), 1982 U.S.C.C.A.N. pp. 2871, 2872,

Moreover, the 1982 amendments came *after* the Secretary promulgated the present definition of "harm" at issue in this case. But instead of using the amendments as an occasion to overrule the Secretary's interpretation, Congress chose to allow the definition of "take" to stand, while amending another section of the statute—making clear in the process that it knew habitat modification could be (and was being) prohibited under the ESA. *See Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782 n. 15, 105 S.Ct. 1620, 1629 n. 15, 84 L.Ed.2d 674 (1985) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n. 8, 95 S.Ct. 2362, 2370 n. 8, 45 L.Ed2d 280 (1975) (same); *Johnson v. Transportation Agency*, 480 U.S. 616, 629 n. 7, 107 S.Ct. 1442, 1450 n. 7, 94 L.Ed.2d 615 (1987) (congressional inaction after interpretation may be probative of approval).

Judge Williams devotes a large portion of his majority opinion to a refutation of this argument. I presume the reason for this emphasis is that he concurred in the initial panel opinion in this case solely on the ground that the 1982 amendments "support the inference" that the prohibition of takings includes a prohibition of some habitat modification.

1 F.3d at 11 (Williams, J., concurring). Having placed all of his eggs in that basket, he understandably finds it necessary to explain his error at length now that he has changed his mind.

I agree that Judge Williams was wrong the first time. He was wrong to rely solely on the 1982 amendments for his decision; I agree that they do not alone support its weight. They indicate that Congress in 1982 probably believed that habitat modification was properly covered by the prohibition on takings. Admitedly, the 1982 amendments prove little about Congress's intent in 1973, and had Congress in 1973 specifically stated that "take" does not include habitat modification the 1982 amendments would not save the FWS regulation. But Congress did no such thing in 1973; it was silent on the question. Consequently, the 1982 amendments do lend some weight to the reasonableness of the agency's definition—if Congress in 1982 believed the definition was reasonable, and the agency believed it was reasonable, then *Chevron* demands that we uphold the regulation unless we find solid evidence to the contrary. No such evidence exists.

Thus the court today moves from wrong to more wrong in attempting to parse this statute. Having forsaken the 1982 amendments as dispositive evidence, no effort is made to determine whether the agency could reasonably have relied on such amendments as persuasive evidence supporting its interpretation. Instead, the agency is asked to prove that the best interpretation of "harm" encompasses habitat modification. Beginning from a wrong premise, applying a wrong standard, it is not surprising that the wrong result is achieved.

Overall, there is nothing in the ESA itself, or in its legislative history, that unambiguously demonstrates that the term "harm" in the definition of "take" does not encompass habitat modification. Indeed, there is evidence to the contrary. *Chevron* commands that we defer to an agency's interpretation of a statute it is entrusted to administer, unless that interpretation is contrary to Congress's unambiguous command or an unreasonable exercise of Congress's vague or ambiguous delegation. The majority has not been so quick to ignore *Chevron* before. *See, e.g., Railway Labor Executives' Ass'n v. National Mediation Bd.*, 988 F.2d 133, 144-45 (D.C.Cir.) (Williams, J., dissenting) ("legislative silence [is] precisely the condition that under *Chevron* is understood to create a gap to be filled by the agency."), *vacated on motion for rehearing*, 996 F.2d 1271 (D.C.Cir.1993). Neither should it ignore *Chevron* today.

Finally, the majority should be even more hesitant to cast aside the agency's interpretation in light of the circuit split that this decision now creates. The Ninth Circuit determined, in *Palila v. Hawaii Dep't of Land and Natural Resources*, 852 F.2d 1106 (9th Cir.1988), that the FWS's "harm" definition was a permissible interpretation of the statute. "The Secretary's inclusion of habitat destruction that could result in extinction follows the plain language of the statute because it serves the overall purpose of the Act, which is 'to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved. . . .' 16 U.S.C. § 1531(b)." *Id.* at 1108. The purpose of the Endangered Species Act, lest we forget, is to protect endangered species. In today's abandonment of our decision of less than a year ago, this court takes a

large step backward from that purpose. The majority may believe it is making a good policy—but that is not our job. Under *Chevron*, we may overturn an administrative regulation only if it contradicts the agency's legislative mandate. Congress does not always speak as plainly as it might in designing administrative missions for the executive branch, so it is not always easy to decipher Congress's marching orders to an agency. But at least we ought to try. I dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 92-5255

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, ET AL., APPELLANTS

v.

BRUCE BABBITT, Secretary of the Interior, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia (91cv01468)

Argued Feb. 17, 1993

Decided July 23, 1993

Before MIKVA, Chief Judge; WILLIAMS and SENTELLE, Circuit Judges.

Opinion for the Court filed by Chief Judge MIKVA, except section II(A)(1), which is filed *per curiam*. Opinion concurring in section II(A)(1) filed by Chief Judge MIKVA. Opinion concurring in section II(A)(1) filed by Circuit Judge WILLIAMS.

Opinion dissenting in part filed by Circuit Judge SENTELLE.

MIKVA, Chief Judge:

Appellants, a group of non-profit citizens' groups, lumber companies, and lumber trade associations, oppose two regulations promulgated by the Fish and Wildlife Service ("FWS" or "agency") under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-44. They appeal a memorandum opinion and order by the district court upholding the regulations by summary judgment and denying appellants' own motion for summary judgment. We find that the challenged regulations are reasonable interpretations of the ESA. We also reject appellants' claim that one of the regulations is void for vagueness. We therefore affirm the district court's judgment.

I. BACKGROUND

The Endangered Species Act of 1973 is a multifaceted and comprehensive law directed toward halting the extinction of species. It is implemented primarily by the Fish and Wildlife Service, an agency of the Department of the Interior. The ESA employs a number of techniques to preserve endangered and threatened species, including land acquisition by the government, the implementation of conservation programs by federal agencies, and the prohibition of various federal and private actions that harm listed species.

Among the more important sections of the ESA is 16 U.S.C. § 1538(a)(1), which forbids any person from committing any of a broad array of activities deemed dangerous to the continued survival of endangered fish and wildlife species. This appeal focuses largely on the prohibition against "taking" an endangered species.

> [W]ith respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to . . . *take* any such species within the United States or the territorial sea of the United States[.]

16 U.S.C. § 1538(a)(1)(B) (emphasis added).

The ESA defines "take" as follows: "[T]o harass, *harm*, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (emphasis added). Much of the controversy surrounding this definition has concerned the meaning of "harm" and the degree to which this term encompasses damage to habitats. One of the FWS regulations challenged by appellants states:

> *Harm* in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.

50 C.F.R. § 17.3 (as amended in 1981). Appellants contend that this regulation's inclusion of habitat modification within the meaning of "take" violates the ESA. They also assert that even if the regulation is not *ultra vires* of the ESA, it is not clear precisely what sort of habitat modification the regulation forbids. They therefore argue that this Court should either declare the regulation void for vagueness or adopt a limiting construction of the regulation, holding that "harm" occurs only where there is an inten-

tionally-caused actual physical injury to a specific member of a listed wildlife species.

The other regulation under review extends the protections for endangered species to threatened species as well. The ESA defines an "endangered species" as "any species which is in danger of extension throughout all or a significant portion of its range. . . ." 16 U.S.C. § 1532(6). The ESA also protects species that are in less immediate peril but are listed as "threatened species." This term refers to "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532 (20).

On its face, 16 U.S.C. § 1538(a)(1) applies its prohibitions, including the prohibition against takings, only to endangered species. However, the ESA allows the FWS to apply these prohibitions to threatened species, as well.

> Whenever any species is listed as a threatened species . . . the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title, in the case of fish or wildlife. . . .

16 U.S.C. § 1533(d).

Appellants challenge a FWS regulation which, at one fell swoop, brings all threatened fish and wildlife species into the protective net of 16 U.S.C. § 1538(a)(1).

> Except as provided in subpart A of this part, or in a permit issued under this part, all of the pro-

> visions in [50 C.F.R. § 17.21, the regulation implementing the section 1538(a)(1) prohibitions] shall apply to threatened wildlife. . . .

50 C.F.R. § 17.3(a) (1978). Appellants argue that this regulation violates the ESA, because § 1533(d) requires the FWS to extend the prohibitions to threatened species on a species-by-species basis and to do so only after making a specific finding that each such extension was "necessary and advisable."

The district court rejected appellants' challenges to both 50 C.F.R. § 17.3 and § 17.31(a) and granted summary judgment to the government. 806 F.Supp. 279. Because all of the issues in this appeal are issues of law, we will review the district court's judgment *de novo*.

II. ANALYSIS

A. The "harm" regulation

1. Compliance with the Endangered Species Act

Appellants argue that the "harm" regulation, 50 C.F.R. § 17.3, violates the ESA, because the statute excludes habitat modification from the types of forbidden actions that qualify as "takings" of species. They assert that the ESA's language and structure, as well as its legislative history, clearly demonstrate that Congress did not intend to prohiibt habitat modification when it defined "take" to include "harm" to an endangered species. 16 U.S.C. § 1532(19). They claim that the meaning of harm should therefore be limited to direct physical injury to an identifiable member of a listed wildlife species.

We hold, *per curiam*, that the "harm" regulation does not violate the ESA by including actions that modify habitat among prohibited "takings."

2. The "void for vagueness" claim

Appellants also maintain that, on its face, the "harm" regulation is void for vagueness. They point out that the Ninth Circuit has interpreted the regulation broadly so that prohibited "harm" includes habitat modification even without proof that death or physical injury to a specific member of a listed species has occurred. *Palila v. Hawaii Dept. of Land and Natural Resources*, 852 F.2d 1106, 1107-09 (1988). The appellants could also have mentioned that the FWS itself offered a similarly broad interpretation of the regulation when it introduced the current definition of "harm" in 1981:

> Some of the comments in favor of the redefinition . . . viewed the action as limiting "harm" to direct physical injury to an individual member of the wildlife species. This was not the intent of the Service and the final redefinition addresses that perception. The purpose of the redefinition was to preclude claims of a Section 9 taking for habitat modification alone without any attendant death or injury of the protected wildlife. Death or injury, however, may be caused by impairment of essential behavioral patterns which can have significant and permanent effects on a listed species.

46 Fed. Reg. 54,748, 54,748 (1981).

Appellants argue that so long as the regulation is subject to such broad constructions, it is impermissibly vague. They claim it will be left to the whims and predictions of biologists to determine when a habitat modification is "*significant*" and when such a modification "*significantly* impair[s] *essential* behavioral patterns." 50 C.F.R. § 17.3 (emphasis added). Prop-

erty owners, say appellants, will thus be subject to criminal sanctions under the ESA based on "some biologist's subjective view."

We are urged to address this problem by construing the regulation to state that "harm" occurs only where there is proof of an intentionally-caused physical injury to a specific member of a listed wildlife species. If we determine that the regulation does not require such proof, appellants contend that we should declare the entire regulation void for vagueness.

It is true, as appellants assert, that regulations with criminal sanctions must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983). This principle, however, does not lead to the conclusion that any person can have a regulation wiped off the books (or prompt a limiting judicial construction of the regulation) merely by showing that it will be impermissibly vague in the context of some hypothetical application.

The seminal case concerning pre-enforcement facial challenges on the grounds of vagueness is *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). *Flipside* states that when a court examines such a challenge, "assuming the enactment implicates no constitutionally protected conduct, [the court] should uphold the challenge only if the enactment is impermissibly vague in *all of its applications*." *Id.* at 495, 102 S.Ct. at 1191 (emphasis added). Although the Supreme Court does not state precisely what it means by "constitutionally protected conduct," it is clear

that it is referring primarily to the First Amendment expressive freedoms, which have long received special protection in vagueness cases. *See, e.g. Smith, Sheriff v. Goguen*, 415 U.S. 566, 573, 94 S.Ct. 1242, 1247, 39 L.Ed.2d 605 (1974). It is equally clear that the Court is not referring to economic activity, which modern vagueness cases have invariably afforded less protection. *See, e.g., Flipside*, 455 U.S. at 498, 102 S.Ct. at 1193 ("economic regulation is subject to a less strict vagueness test").

Appellants, who are not currently the subject of an enforcement action under 50 C.F.R. § 17.3, nonetheless contend that the regulation will inhibit their ability to develop their land, especially by harvesting timber. In other words, the conduct implicated by this case is economic activity. (To the degree that appellants contend that the regulation results in a "taking" of their property in the Fifth Amendment sense, their remedy would be compensation, not a voiding of the regulation). In accordance with *Flipside*, we therefore will not find 50 C.F.R. § 17.3 void for vagueness unless the regulation is impermissibly vague in all of its applications.

In fact, the regulation contains features that prevent it from being invariably vague as applied. The definition of "harm" explicitly limits prohibited habitat modification to that which "actually kills or injures wildlife." 50 C.F.R. § 17.3. Moreover, in order to establish a civil or criminal violation under the "take" provision of the ESA or a regulation implementing that provision, the government must establish that the charged party *knowingly* violated the statute or regulation. 16 U.S.C. § 1540(a) and (b). The Supreme Court has recognized that "a

scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Flipside*, 455 U.S. at 499, 102 S.Ct. at 1193.

In light of these limitations, there are obviously types of activity, including habitat modification, that 50 C.F.R. § 17.3 clearly prohibits without a hint of vagueness. For example, it obviously forbids the very sort of conduct that appellants argue it should be limited to—habitat modification that causes ascertainable physical injury or death to an individual member of a listed species. Furthermore, § 17.3 unquestionably prohibits major acts of habitat degradation that destroy a species' ability to breed, feed, or shelter. For instance, a person aware of the regulation would be considered impermissibly vague. Unclear-cutting an entire forested area known to be populated by spotted owls.

Because the regulation is not vague in all of its applications, we may not declare it void on its face. We do not dismiss the possibility that some enforcement contexts may arise in which the challenged regulation would be considered impermissibly vague. Under *Flipside*, however, the fact that there might be some type of activity whose legality is blurry under the regulation does not render the entire regulation facially invalid. Specific vagueness concerns about the regulation can be addressed when and if they are properly raised in the framework of a concrete challenge to a particular application of the regulation.

Appropriate judicial restraint obligates us to wait for specific applications of the regulation to arise, for, as *Flipside* observed, the government may in the meantime take further steps "that will sufficiently narrow protentially vague or arbitrary interpreta-

tions" of the regulation. 455 U.S. at 504, 102 S.Ct. at 1196. "Although it is possible that specific future applications . . . may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise." *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 52, 86 S.Ct. 1254, 1265, 16 L.Ed.2d 336 (1966), *overruled on different grounds by Healy v. Beer Institute, Inc.*, 491 U.S. 324, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989).

B. The blanket extension of protections to all threatened species

Appellants also challenge 50 C.F.R. § 17.31(a), by which the FWS extended the 16 U.S.C. § 1538(a)(1) prohibitions as to endangered species to all threatened species as well. The FWS issued this regulation under the authority granted to it by the ESA at 16 U.S.C. § 1533(d). For the sake of convenience, we quote that provision again:

> Whenever any species is listed as a threatened species . . . the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title, in the case of fish or wildlife. . . .

16 U.S.C. § 1533(d).

The challenged regulation provides in relevant part:

> (a) Except as provided in subpart A of this part, or in a permit issued under this subpart, all of the provisions in § 17.21 [which implements the

> prohibitions contained in 16 U.S.C. § 1538(a)(1)] shall apply to threatened wildlife, except § 17.21(c)(5).
>
> * * * * *
>
> (c) Whenever a special rule in §§ 17.40 to 17.48 applies to a threatened species, none of the provisions of [paragraph (a)] of this section will apply. The special rule will contain all the applicable prohibitions and exceptions.

50 C.F.R § 17.31.

In short, the FWS has, with this regulation established a regime in which the prohibitions established for endangered species are extended automatically to all threatened species by a blanket rule and then withdrawn as appropriate, by special rule for particular species and by permit in particular situations. Although appellants' dissatisfaction is focused entirely on this treatment of the "take" prohibition, the regulation applies all of the § 1538(a)(1) prohibitions to threatened species in this manner.

Appellants contend that the FWS has created the system upside down, in violation of the ESA. They maintain that § 1533(d) requires the Secretary to extend the prohibitions to threatened species on a species-by-species basis. They also assert that the statute requires the agency to explain in each instance why it is "necessary and advisable" to apply the prohibitions to a threatened species.

We are not persuaded. As was the case with the "harm" regulation, there is no clear indication that § 17.31(a) violates the intent of the ESA. The statute does not unambigously compel the agency to expand regulatory protection for threatened species

only by promulgating regulations that are specific to individual species. In light of the substantial deference we thus owe the agency under the principles of *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed. 2d 694 (1984), we uphold the challenged regulation as a reasonable interpretation of the statute.

Appellants argue that the plain language of the ESA establishes that Congress intended regulations extending the § 1538(a)(1) prohibitions to threatened species to apply only to individual species. They focus on the first sentence of § 1533(d), pointing out its clear use of the singular. ("Whenever *any species* is listed as *a threatened species*. . . .") They maintain that in light of the first sentence's unambiguous reference to regulations for a single threated species, the phrase "any threatened species" in the second sentence must also refer to the singular. Appellants finally note that the Senate Report bolsters their interpretations of the language of § 1533(d) as authorizing regulation tailored to individual species.

> [The section] requires the Secretary, once he has listed *a species* of fish or wildlife as *a threatened species*, to issue regulations to protect *that species*. Among other protective measures available, he may make any or all of the acts and conduct defined as "prohibited acts" . . . as to "endangered species" also prohibited acts as to *the particular threatened species*.

S.REP. No. 93-307, 93d Cong., 1st Sess. 8 (1973), U.S.Code Cong. & Admin.News 1973, pp. 2989, 2996. (emphasis added).

It is however, less than clear that the language of § 1533(d) is actually intended to require regulations

extending the § 1538(a)(1) prohibitions to apply only to individual species. The reference to "any threatened species" in the second sentence of § 1538 (d) could just as easily mean "any or all threatened species." And appellants' claim that the clear meaning of the first sentence should control our interpretations of the second is not necessarily valid, for, as appellees argue, the two sentences may represent separate grants of authority. It is possible that it is the second sentence alone that grants the agency authority to extend the § 1538(a)(1) prohibitions to threatened species. *See infra* pp. 7-8.

Furthermore, in response to appellants' use of the Senate Report, appellees counterpose the use of plural language in the discussion of § 1533(d) in the House Report.

> The Secretary is authorized to issue appropriate regulations to protect endangered or threatened species; he may also make specifically applicable any of the prohibitions with regard to *threatened species* that have been listed in section 9(a) as are prohibited with regard to endangered species. Once an animal is on the threatened list, the Secretary has almost an infinite number of options available to him with regard to the permitted activities for *those species.* He may, for example, permit taking, but not importation of *such species*, or he may choose to forbid both taking and importation but allow the transportation of *such species.*

H.R.REP. NO. 93-412, 93rd Cong., 1st Sess. 12 (1973). The possible conflict between the two reports, as well as the apparent inconsistency within the above-quoted paragraph itself as to singular and plural, shows the

perils of attempting to use ambiguous legislative history to clarify ambiguous words within statutes.

In any case, even assuming that the reference to "any threatened species" in the second sentence of § 1533(d) is singular, the statute still would not clearly forbid the FWS from proceeding in the manner it did. Appellants impart inappropriate significance to the use of the singular versus the plural. The very first provision of the United States Code states, "In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . words importing the singular include and apply to several persons, parties, or things [and] words importing the plural include the singular." 1 U.S.C. § 1.

Furthermore, regardless of the use of singular and plural words, § 1533(d) simply does not speak directly to the question of whether the FWS must promulgate protections species-by-species or may extend such protection in a single rulemaking. We will rarely impose a particular procedural strategy on an agency when the relevant statute does not even explicitly address how the agency should proceed. "In [the] process of filling any gap left, implicitly or explicitly, by Congress, the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448, 107 S.Ct. 1207, 1221, 94 L.Ed.2d 434 (1987) (citations omitted).

Appellants attempt to bolster their argument by claiming that the design and structure of the ESA unavoidably require the FWS to extend the § 1533 (d) prohibitions to threatened species on a species-by-species basis. They contend that Congress created

the distinct categories of endangered and threatened species specifically so that each category would receive the precise degree of protection it required. By presumptively according the very same protections to threatened species as to endangered species, they argue, the FWS is violating this statutory design.

This argument also fails, because regardless of the ESA's overall design, § 1533(d) arguably grants the FWS the discretion to extend maximum protection to all threatened species at once if, guided by its expertise in the field of wildlife protection, it finds it expeditious to do so. In any case, even assuming that Congress intended there to be an indelible difference between the treatment of endangered species and threatened species, appellants fail to acknowledge the very real differences that exist even under the challenged regulation. As noted above, *supra*, p. 5, the regulation contemplates the issuance of "special rules" for individual threatened species. 50 C.F.R. § 17.31(c). The FWS has actually issued special rules for a substantial number of the fish and wildlife species listed as threatened. *See* 50 C.F.R. §§ 17.40-48.

Moreover, FWS regulations provide for the issuance of permits, under certain circumstances, to individual applicants who request permission to commit otherwise prohibited activities with respect to threatened wildlife. 50 C.F.R. § 17.32. Similar permits are available with regard to endangered species, 50 C.F.R. §§ 17.22-23, but the FWS has made clear that they are more readily available for threatened species.

> The new Subpart D would establish a set of blanket prohibitions for threatened wildlife. These are the same prohibitions that the Act pro-

> vides for endangered wildlife. . . . The new Subpart D would then provide for permits for any threatened wildlife. These permits would be more liberal than permits available under Subpart C . . . for endangered wildlife, in that they would be available for more purposes, and the strict procedural rules for endangered wildlife permits would not apply.

40 Fed.Reg. 28,713 (1975).

The FWS has thus maintained a two-tier approach to species protection. Consequently, even if the ESA does in fact mandate that the agency preserve different approaches to the conservation of endangered and threatened species, the regulatory scheme satisfies the statute.

Lastly, appellants claim that 50 C.F.R. § 17.31(a) violates the ESA because § 1533(d) requires the FWS to make individualized formal findings that the prohibitions are "necessary and advisable" for the conservation each threatened species to which they are extended. Not only did the agency fail to make such findings for each individual species; it did not even make such a finding in regard to the category of threatened species as a whole when it issued the blanket extension of prohibitions.

As appellees argue, however, there is a reasonable reading of § 1533(d) that would not require the FWS to issue formal "necessary and advisable" findings when extending the prohibitions to threatened species. According to this interpretation, the two sentences of § 1533(d) represent separate grants of authority. The second sentence gives the FWS discretion to apply any or all of the § 1538(a)(1) prohibitions to threatened species without obligating it

to support such actions with findings of necessity. Only the first sentence of § 1533(d) contains the "necessary and advisable" language and mandates formal individualized findings. This sentence requires the FWS to issue whatever other regulations are "necessary and advisable," including regulations that impose protective measures *beyond* those contained in § 1538(a)(1).

In sum, we find it far from clear that 16 U.S.C. § 1533(d) requires the FWS to extend protections to threatened species on a species-by-species basis or that it mandates that the agency issue formal findings of necessity to support each such extension. In light of the statute's ambiguity, the challenged FWS regulation is a reasonable and permissible construction of the ESA. We therefore uphold 50 C.F.R. § 17.31(a).

III. CONCLUSION

Neither the regulation defining harm nor the regulation extending blanket protection to threatened species is an unreasonable interpretation of the Endangered Species Act. Moreover, the "harm" regulation is not impermissibly vague on its face. We therefore affirm the judgment of the district court and uphold both regulations.

It is so ordered.

MIKVA, Chief Judge, concurring in Section II (A) (1) of the opinion:

I write separately in order to articulate fully my reasons for rejecting appellants' argument that we should set aside the "harm" regulation as violative of the ESA.

When we review an agency's construction of a statute that it is entrusted to administer, we follow the deferential approach set out by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). "If the statute is clear and unambiguous that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 1817, 100 L.Ed.2d 313 (1988) (citations omitted). If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2782. "In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844, 108 S.Ct. at 2782.

Appellants contend that Congress clearly intended to exclude habitat modification from the types of takings prohibited by the ESA and that this Court thus owes no deference to the FWS "harm" regulation. I disagree. In my view, the "harm" regulation conflicts with neither the ESA itself nor its ambiguous legislative history and is unquestionably a permissible and reasonable construction of the statute. I therefore do not accept appellants' claim that 50 C.F.R. § 17.3 transgresses the ESA.

It is hard to construct a legislative scenario in which Congress would have avoided the problem of habitat modification when it crafted the ESA. The drafters of the statute realized that the degradation of habitats posed one of the gravest threats to the continued existence of endangered and threatened species. As the Supreme Court has noted:

> In shaping [the ESA], Congress started from the finding that "[t]he two major causes of extinction are hunting and destruction of natural habitat." S.Rep. No. 93-307, p. 2 (1973). Of these twin threats, Congress was informed that the greatest was destruction of natural habitats. . . .

TVA v. Hill, 437 U.S. 153, 179, 98 S.Ct. 2279, 2294, 57 L.Ed.2d 117 (1978). Indeed, the first stated purpose of the ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved. . . ." 16 U.S.C. § 1531(b).

Appellants acknowledge that Congress intended to halt injurious habitat modification when it passed the ESA. They contend only that Congress did not mean to combat habitat degradation on private lands through the prohibition against takings in 16 U.S.C. § 1538. They argue that Congress intended to combat this problem solely through § 1534's provision for federal land acquisition.

According to appellants, the legislative history of the "take" provision establishes that Congress did not mean for that term to encompass habitat modification. They note that the original bill that was referred to the Senate Committee on Commerce, S. 1983, defined "take" to include "destruction, modi-

fication, or curtailment of [an endangered species'] habitat or range." S. 1983, 93d Cong., 1st Sess., § 3(6) (1973). The bill reported out of committee, however, did not refer to habitat modification in the definition of "take." This omission, appellants argue, evinces Congress' intent not to include habitat modification within the scope of prohibited "takings."

Appellants maintain that Congress intended instead to address the problem of habitat modification caused by private actions on private lands exclusively through land acquisition by the federal government. Section 1534 authorizes the Secretary of the Interior, as well as the Secretary of Agriculture with respect to the National Forest System, to acquire land as part of "a program to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species. . . ." 16 U.S.C. § 1534(a). Appellants point to various statements in the legislative history that suggest that some members of Congress may have wanted land acquisition, not the prohibition of land uses, to be the ESA's sole weapon against habitat modification on private lands. Appellants further argue that Congress logically *must* have intended land acquisition to be the exclusive mechanism for preventing such habitat modification. Otherwise, they contend, agency officials would always choose the free alternative of prohibiting a damaging land use under the "take" provision, rather than paying to acquire the affected land.

I find the legislative history to be most ambiguous regarding whether Congress intended to include habitat modification within the meaning of "take." It is true that the Senate Committee chose not to use the S. 1983 definition of "take," which specifically encompassed habitat modification. Instead, the Com-

mittee adopted a definition from the other bill under consideration, S. 1592, which did not explicitly include habitat modification. But as the district court noted, there is no indication in the legislative history as to why the Committee selected one definition over the other.

There is nothing to suggest that Congress chose the definition it did in order to exclude habitat modification. The Committee may have rejected the S. 1983 definition only because it apparently would have made habitat modification a *per se* violation of the ESA. It is certainly possible that the Committee did not intend to foreclose an administrative regulation prohibiting habitat modification—so long as that prohibition was accompanied by limitations, such as those contained in the FWS regulation under review, requiring that there be actual injury or death to the species. In any case, Congress manifested no clear intent to exclude habitat modification from the "take" definition. Indeed, the Senate Committee Report states that " 'Take' is defined . . . in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." S.REP. NO. 93-307, 93d Cong., 1st Sess. 7 (1973), U.S.Code Cong. & Admin.News 1973, 2995.

Appellants' contention that Congress intended land acquisition to be the exclusive instrument for curbing habitat modification on private lands is similarly speculative. Nothing in the language of 16 U.S.C. § 1534 or in the legislative history establishes that Congress meant land acquisition to be the only mechanism for habitat protection on private lands. The only evidence appellants can garner in support of their assertion to the contrary is a few isolated

and ambiguous remarks by members of Congress on the floor. *See* 119 CONG.REC. 25,669 (1973) (statement of Sen. Tunney); 119 CONG.REC. 30,162 (1973) (statement of Rep. Sullivan); 119 CONG.REC. 25,691 (1973) (statement of Sen. Nelson). The general rule is that "debates in Congress expressive of the views and motives of individual members are not a safe guide . . . in ascertaining the meaning and purpose of the law-making body." *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474, 41 S.Ct. 172, 179, 65 L.Ed. 349 (1921). In any case, these statements do not establish that even the speakers themselves intended land acquisition to be the *exclusive* protective mechanism for habitats on private lands.

There is also little force behind appellants' claim that including habitat modification within the meaning of "take" renders the land acquisition provision of § 1534 a nullity. Appellants suggest that agency officials will not pay to acquire land if they can accomplish the same habitat preservation objective without cost by banning the offending land use. But there are in fact many reasons why, in its effort to protect endangered and threatened species, the government might choose to acquire land rather than simply forbid damaging activity. Federal wildlife managers can surely do more to help such species on government-owned and controlled preserves than they could ever accomplish on private lands. Indeed, § 1534 land acquisition is explicitly designed to facilitate "conservation programs," a phrase that suggests a type of intervention more complex and proactive than simply forbidding certain activities on private lands.

Appellants argue that the agency must interpret the word "harm" narrowly so as not to include

habitat modification because none of the other "take" terms—"harass, . . . pursue, hunt, shoot, wound, kill, trap, capture, [and] collect"—represents a land use action that injures wildlife only indirectly. They argue that under the principle of statutory construction known as *noscitur a sociis*, a general term in a list should be interpreted narrowly "to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307, 81 S.Ct. 1579, 1582, 6 L.Ed.2d 859 (1961).

Despite appellants' suggestions, however, the other prohibitions can limit a private landowner's use of his land in a rather broad manner. In particular, the prohibition against "harassment" can be used to supress activities that are in no way intended to injure an endangered species. The House Report stated:

> [Take] includes harassment, whether intentional or not. This would allow, for example, the Secretary to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young.

H.R.REP. NO. 93-412, 93d Cong., 1st Sess. 11 (1973). Indeed, the FWS has defined "harass" in a way that is almost as broad as the "harm" definition:

> *Harass* in the definition of "take" in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to signficantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.

50 C.F.R. § 17.3. Appellants have not challenged this definition.

Noscitur a sociis means, literally, that a word is known by the company it keeps. *Jarecki*, 367 U.S. at 307, 81 S.Ct. at 1582. In the definition of "take," the term "harm" is accompanied by an assortment of words ranging from the precise and narrow "shoot" to the vague and expansive "harass." Consequently, even if I were willing to find an agency's construction of a statute to be impermissible based solely on a seldom-used and indeterminate principle of statutory construction, I would not do so in the present case.

Although the ESA is generally ambiguous as to whether the "take" prohibition forbids habitat modification, there is at least one feature of the statute that strongly suggests that Congress did in fact intend to include habitat modification within the meaning of "take." In 1982, Congress amended the ESA to include a provision authorizing the FWS to issue a permit allowing "any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B).

By allowing the agency, at its discretion, to permit "incidental takings," Congress implicitly confirmed that incidental takings were otherwise forbidden by the Act. And it is hard to imagine what "incidental takings" might be other than habitat modification. Indeed, the legislative history of the 1982 amendments reveals that habitat modification was precisely what Congress had in mind. The House Report states, "This provision is modeled after a habitat conservation plan that has been developed by three Northern California cities. . . . [It] will . . . provide the institutional framework to permit cooperation

between the public and private sectors in the interest of endangered species and habitat conservation." H.R.REP. NO. 97-835, 97th Cong., 2d Sess. 30-31 (1982), U.S.Code Cong. & Admin.News 1982, pp. 2807, 2871, 2872.

Overall, there is nothing in the ESA itself or in its legislative history that unambiguously demonstrates that the term "take" does not encompass habitat modification. Indeed, as I noted in my discussion of the 1982 amendments, there is evidence to the contrary. *Chevron* commands that unless it is absolutely clear that an agency's interpretation of a statute, entrusted to it to administer, is contrary to the will of Congress, courts must defer to that interpretation so long as it is reasonable. *Chevron*, 467 U.S. at 844, 104 S.Ct. at 2782.

In upholding the challenged regulation, we join the Ninth Circuit, which has similarly held that the agency's inclusion of habitat destruction in the definition of "harm" is a permissible interpretation of the ESA. That Circuit has stated that "[t]he Secretary's inclusion of habitat destruction that could result in extinction follows the plain language of the statute because it serves the overall purpose of the Act. . . ." *Palila v. Hawaii Dep't of Land and Natural Resources*, 852 F.2d 1106, 1108 (9th Cir.1988).

WILLIAMS, Circuit Judge, concurring in Section II(A)(1) of the opinion:

I agree that the "harm" regulation, 50 CFR § 17.3, complies with the Endangered Species Act—but *only* because of the 1982 amendments to the ESA. See Pub.L. 97-304, §§ 4(a)(2) and 6(1) (codified respectively at 16 U.S.C. §§ 1536(b)(4)(B) and 1539(a)(1)(B)). Those amendments, which authorize the FWS to issue permits for "any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity," 16 U.S.C. § 1539(a)(1)(B), support the inference that the ESA otherwise forbids some such incidental takings, including some habitat modification. But for the 1982 amendments, I would find Judge Sentelle's analysis highly persuasive—including his discussion of the *noscitur a sociis* canon. See *RLEA v. NMB*, 988 F.2d 133, 144 (D.C.Cir.1993) (Williams, J., dissenting) (characterizing the canon as a "powerful linguistic norm").

SENTELLE, Circuit Judge, dissenting:

As we have observed, "some will find ambiguity even in a 'No Smoking' sign." *International Union, United Auto, Aerospace and Agric. Implement Workers of Am. v. General Dynamics Land Sys. Div.*, 815 F.2d 1570, 1575 (D.C.Cir.1987). In the present case the Fish and Wildlife Service has established that it would not only find such ambiguity, but would deem a congressional authorization for the erection of "No Smoking" signs to authorize the adoption of regulations against chewing and spitting.

As Chief Judge Mikva notes, this case is governed by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed. 2d 694 (1984). That decision mandates a two-step analysis. At the first step "we inquire into whether Congress has directly spoken to the precise question at issue. If we can come to the unmistakable conclusion that Congress had an intention on the precise question at issue, our inquiry ends there." *Nuclear Info. Resource Serv. v. Nuclear Regulatory Comm'n*, 969 F.2d at 1169, 1173 (1992) (en banc) (citations and internal quotation marks omitted). At the second step "if the statute . . . is silent or ambiguous with respect to the specific issue before us, . . . we defer to the agency's interpretation of the statute if it is reasonable and consistent with the statute's purpose." *Id.* (citations and internal quotation marks omitted). While I am willing to concede the possibility that some ambiguity may remain in the unusually specific recitation by Congress of its intent in defining the term "take," I cannot cram the agency's huge regulatory definition into the tiny crack of ambiguity Congress left.

As a colleague of ours has observed, "the second prong of the *Chevron* inquiry, whether an agency's interpretation of an ambiguous statutory provision is reasonable, is also not devoid of content." *National Ass'n for Better Broadcasting v. FCC*, 849 F.2d 665, 671 n. 3 (D.C.Cir.1988) (Wald, C.J., dissenting). In the present case, I see no reasonable way that the term "take" can be defined to include "significant habitat modification or degradation" as it is defined in 50 C.F.R. § 17.3. I have in my time seen a great many farmers modifying habitat. They modify by plowing, by tilling, by clearing, and in a thousand other ways. At no point when I have seen a farmer so engaged has it occurred to me that he is taking game. Nor do I think it would occur to anyone else that he was taking wildlife. He may be doing something harmful to wildlife, but he is not "taking" it.

In my view, the fact that the farmer may be indirectly harming wildlife, and that the statutory definition includes "harm" helps the agency's cause but little. To analogize again to the smoking proposition, if Congress authorized the erection of "No Smoking" signs in public buildings and thereafter defined smoking to include lighting, burning, puffing, inhaling, and otherwise harmfully employing the noxious nicotine-bearing tobacco products," some zealous bureau might well attempt to define smoking to include chewing and spitting under the rubric of the "harmful use" in Congress's definition of smoking. Perhaps some might think that reference to harm would cause the concept of smoking to include chewing. I do not think those creative regulators would be thinking reasonably if they should do so, nor do I think the regulators act reasonably in the present case.

As my colleage observes, there is an ancient "principle of statutory construction known as *noscitur a sociis*, a general word in a list should be interpreted narrowly 'to avoid the giving of unintended breadth to the Acts of Congress.' " Mikva Op. at 10, quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307, 81 S.Ct. 1579, 1582, 6 L.Ed.2d 859 (1961). In the present statute, all the other terms among which "harm" finds itself keeping company relate to an act which a specifically acting human does to a specific individual representative of a wildlife species. In fact, they are the sorts of things an individual human commonly does when he intends to "take" an animal. Otherwise put, if I were intent on taking a rabbit, a squirrel, or a deer, as the term "take" is used in common English parlance, I would go forth with my dogs or my guns or my snares and proceed to "harass, . . . pursue, hunt, shoot, wound, kill, trap, capture, or collect" [1] one of the target species. 16 U.S.C. § 1532 (19). If I succeeded in that endeavor, I would certainly have "taken" the beast. If I failed, I would at least have "attempt[ed] to engage in . . . such conduct." *Id.*

All this falls neatly within a reasonable construction of "take," just as puffing a pipe falls neatly within the definition of smoking, and I would not dare to do such in front of a "No Smoking" sign. However, I would think it most unreasonable if a regulator told me that I could not chew nicotine gum in front of the same sign because the agency had decided that it was harmful and therefore constituted

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[1] The only word replaced by ellipses is "harm," the word under examination.

smoking. It appears to me that the Fish and Wildlife Service has engaged in a similarly unreasonable expansion of terms in the present case.

I do not find the unreasonableness of the Service's construction to be in any way alleviated by the Senate Committee Report stating that " '[t]ake' is defined . . . in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." S.REP. No. 93-307, 93d Cong., 1st Sess. 7 (1973), U.S.Code Cong. & Admin.News 973, 2995 (quoted by Mikva Op. at 9). Should one committee of the anti-smoking Congress have included in its discussion of the "No Smoking" sign authorization language to the effect that " 'smoking' is defined in the broadest possible manner to include every conceivable way in which a person can 'smoke' or attempt to 'smoke' any form of tobacco," that still would not convince me that the term could be defined to include chewing. Nor does the majority's reliance on that same sort of legislative history convince me that Congress, by mandating the broadest possible manner of definition, intended to deprive the definition of any bounds whatsoever and turn the word into a free form concept inclusive of anything an agency might wish it to cover.

I am bolstered in my conviction by another rule of statutory construction: that is, the presumption against surplusage. "[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *Mackie v. Lanier Collection Agency*, 486 U.S. 825, 837, 108 S.Ct. 2182, 2189, 100 L.Ed.2d 836 (1988). The construction placed upon the word "harm" by the agency and adopted by the court today

renders superfluous everything else in the definition of "take." If "harm" means any "act which actually kills or injures wildlife," including "habitat modification or degradation," I can see no reason why Congress also included in the definition of "take" the terms "harass, . . . pursue, hunt, shoot, wound, kill, trap, capture, [and] collect." 16 U.S.C. § 1532(19). Every single one of those acts, particularly when coupled with further language of the congressional definition which includes "to attempt to engage in any such conduct," *id.*, falls within the definition of "harm" as understood by the agency. I am unwilling to believe that Congress deliberately wasted the considerable ink and paper devoted to the many copies of this legislation containing all the other words in section 1532(19). I am, therefore, unwilling to accept the Service's definition in the present case, no matter how well intended.

Because I would void the regulation at this early stage, I would not reach the void-for-vagueness claim. I would observe, however, that I do not see how a definition as boundless as the agency conceives for the word "take" and the component "harm" of its definition could readily avoid being impermissibly vague.

I respectfully dissent.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 91-1468

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, ET AL., PLAINTIFFS

v.

MANUAL LUJAN, JR., Secretary of the Interior, JOHN F. TURNER, Director, U.S. Fish and Wildlife Service, DEFENDANTS

May 29, 1992

MEMORANDUM OPINION

NORMA HOLLOWAY JOHNSON, District Judge.

Plaintiffs are various organizations, businesses and individuals, who depend directly or indirectly on the timber industry in the Pacific Northwest and in the Southeast for their livelihood. They challenge two regulations promulgated by the Secretary of the Interior ("the Secretary") as contrary to the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544 (1988). They also claim that one of these regulations is void for vagueness. Currently pending before the Court are the parties' cross-motions for summary judgment. The parties agree that there are no genuine disputes of material fact and that this case raises purely legal issues. After careful consideration of the

submission of the parties and the entire record herein, and for the reasons outlined below, the Court will grant defendants' motion for summary judgment and deny plaintiffs' motion for summary judgment.

REGULATORY AND FACTUAL BACKGROUND

The Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1988), was enacted by Congress in 1973 to provide a program for the conservation of endangered species and threatened species and for the preservation of their ecosystems. 16 U.S.C. § 1531(b). Section 4 of the ESA directs the Secretary to designate species of fish, wildlife, or plants as "endangered" or "threatened" in accordance with certain procedures. 16 U.S.C. § 1533(a)(1). The Secretary is also empowered to designate "critical habitat" for such listed species and to develop recovery plans for their survival. 16 U.S.C. §§ 1533(a)(3), 1533(f).

The ESA prohibits certain activities with respect to species that are designated as endangered or threatened. Section 7(a)(2) of the ESA, which applies only to federally-authorized actions, requires all federal agencies to insure that their activities will not "jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical. . . ." 16 U.S.C. § 1536(a)(2).

Section 9 of the ESA, which applies to both federal and nonfederal actors, addresses prohibited actions with respect to endangered species only. At issue in this case is the scope of the "take" provision, § 1538(a)(1)(B), which makes it unlawful for any person to "take any [endangered] species within the United States." The ESA defines "take" as follows:

> The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

16 U.S.C. § 1532(19). Although the ESA does not define the terms within this definition any further, the Secretary has promulgated a regulation defining the word "harm" as follows:

> Harm in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.

50 C.F.R. § 17.3 (1991).

The prohibition against "takings" set out in § 1538 (a)(1) applies only to those species listed as endangered. However, section 4(d) of the ESA allows the Secretary to extend some or all of the protections in § 1538(a)(1) to threatened species as well:

> Whenever any species is listed as a threatened species . . ., the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title, in the case of fish or wildlife. . . .

16 U.S.C. § 1533(d). Pursuant to this section, the Secretary has adopted a regulation which extends the prohibitions listed in § 1538(a)(1), including the prohibition against "takings," to *all* wildlife species listed as threatened:

> Except as provided in subpart A of this part, or in a permit issued under this subpart, all of the provisions in § 17.21 [which restates the prohibitions outlined in 16 U.S.C. § 1538(a)(1)] shall apply to threatened wildlife, except § 17.21(c)(5).

50 C.F.R. § 17.31(a) (1991).

Plaintiffs in this action are small landowners, small logging companies, and families allegedly dependent on the forest products industry in the Pacific Northwest and in the Southeast. In order to enforce the regulations at 50 C.F.R. § 17.3 and § 17.31(a) and to avoid "harm"-type takings of the northern spotted owl and other threatened wildlife species, the Fish and Wildlife Service ("FWS") has placed restrictions on timber harvesting. Plaintiffs claim that these restrictions have forced them to lay off employees, limited their income from trust lands, reduced the timber supply, and placed some of the plaintiffs in the position of being unable to support their families. They bring this action challenging the "harm" definition at 50 C.F.R. § 17.3 as contrary to the ESA and void for vagueness. Plaintiffs also challenge the Secretary's regulation at 50 C.F.R. § 17.31(a), extending the protections for endangered species to threatened species, as contrary to the ESA.

DISCUSSION

In reviewing an agency's construction of a statute, a court must first determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct.

2788, 2781, 81 L.Ed.2d 694 (1984). Where the statute and the intent behind it are ambiguous with respect to a matter at issue, however, a court must decide whether the agency's construction of the statute is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2782. A court may not substitute its own construction of a statutory provision if the agency's interpretation is "reasonable." *Id.* at 844, 104 S.Ct. at 2782.

A. *The Definition of "Harm" at 50 C.F.R. § 17.3*

1. § 17.3 Does Not Violate the ESA

The Secretary's regulation at 50 C.F.R. § 17.3 defines "harm" to mean "an act which actually kills or injures wildlife"; the harm definition in § 17.3 includes "significant habitat modification or degradation where it actually kills or injures wildlife." Plaintiffs argue that, by establishing habitat modification as a form of harm, this regulatory definition goes beyond the definition that Congress intended for the term "take." Under the ESA, the term "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Congress made clear that the definition of "take" was to be interpreted "in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." S. Rep. No. 307, 93d Cong., 1st Sess. 7 (1973). *See also* H.R.Rep. No. 412, 93d Cong., 1st Sess. 11, 15 (1973) (" 'Take' is defined broadly"; prohibition against "takings" in Section 9 of ESA "includes, in the broadest possible terms, restrictions on the taking,

importation and exportation, and transportation of [endangered] species.")

Notwithstanding this clear intent by Congress to give an expansive definition to the term "take," plaintiffs insist that Congress did not intend the term to reach habitat modification. In support of this contention, plaintiffs make three principal arguments. First, plaintiffs point out that the original ESA bill which was referred to the Senate Committee on Commerce, S. 1983, defined "take," with respect to fish or wildlife, to include "destruction, modification, or curtailment of its habitat or range." The fact that the bill was reported out of committee without any reference to habitat modification in the definition of "take" is an indication, plaintiffs argue, that the Senate intended the scope of the word "take" not to encompass habitat modification.

Plaintiffs are asking this Court to engage in speculation about legislative intent. The Court acknowledges that S. 1983 offered a different definition of the word "take" than the one that was subsequently adopted by the Senate Committee on Commerce. However, the Court notes that S. 1983 was only one of two endangered species bills under consideration by the Senate Committee on Commerce at that time. The other bill, S. 1592, defines "take" exactly as it now appears in the statute. From this legislative history, the Court can conclude no more than that the Senate chose to adopt the definition in one bill over that in another. There is absolutely nothing in the legislative history of the ESA to indicate that the Senate rejected the definition in S. 1983 specifically because it wanted to exclude habitat modification from the definition of take. In fact, the Senate Re-

port indicates just the opposite, that "take" was being defined "in the broadest possible manner."

It may be, as defendants suggest, that the Senate rejected the definition of "take" in S. 1983 because it did not want habitat modification *per se* to constitute a taking; or it may be that the Senate chose to leave the decision of whether to define takings to include habitat modification in the hands of the Secretary. However, the Court will not rely upon such speculation to deduce legislative intent.

Plaintiffs' second argument is that Congress intended to address the problem of habitat modification exclusively through federal land acquisition, not through the take provision. Section 4 of the ESA grants the Secretary the authority to utilize land acquisition measures to carry out conservation programs for endangered and threatened species. *See* 16 U.S.C. § 1534. However, nothing in the language of § 1534 or in the legislative history of the land acquisition provision suggests that Congress intended land acquisition to be the *exclusive* protective mechanism for listed species' habitat. The language and legislative history of § 1534 clearly indicate that Congress considered land acquistion a critical tool in preserving habitat, but they do not suggest that Congress intended it to be the only tool. *See* 16 U.S.C. § 1534(a)(1) ("To carry out such a program [of species conservation], the appropriate Secretary shall utilize the land acquisition and other authority . . .); H.R.Conf.Rep. No. 740, 93d Cong., 1st Sess. 25 (1973) ("Any effective program for the conservation of endangered species demands that there be adequate authority vested in the program managers to acquire habitat which is critical to the survival of those species."); S.Rep. No. 307, 93 Cong., 1st Sess. 4 (1973)

("Often, protection of habitat is the only means of protecting endangered animals which occur on non-public lands.")

Finally, plaintiffs argue that the amendment which added the term "harm" to the ESA definition of "take" was a technical amendment which was never debated and should therefore not be interpreted expansively. *See* 119 Cong.Rec. 25,682-83 (1973) (clarifying amendments offered by Senator Tunney). Plaintiffs' argument itself relies upon an unwarranted expansive reading of the Secretary's regulation. Plaintiffs claim that the § 17.3 definition of "harm," unlike every other component of the "take" definition, "allows land use or habitat modification actions to be barred as takings." Plaintiffs' Mem. for Summary Judgment at 21. The Secretary correctly points out, however, that not all habitat modification actions constitute "harm" under the § 17.3 definition; rather, only an action which "actually kills or injures wildlife" falls into the category of "harm." The Secretary's definition thus requires proof of actual killing or injury to wildlife, consistent with the ESA's definition of "take."

The Court concludes that the Secretary's definition of harm at § 17.3 is entirely consistent with the ESA's definition of take. Congress made clear that it was defining "take" extremely broadly, "to include every conceivable way in which a person can 'take' or attempt to 'take.'" S.Rep. No. 307, at 7. Courts interpreting the "take" definition have consistently upheld the Secretary's definition of "harm" under the ESA. *See TVA v. Hill*, 437 U.S. 153, 184-85 n. 30, 98 S.Ct. 2279, 2297 n. 30, 57 L.Ed.2d 117 (1978); *Palila v. Hawaii Dep't of Land & Natural Resources (Palila I)*, 471 F.Supp. 985 (D.Haw.1979), *aff'd*,

639 F.2d 495 (9th Cir. 1981)[1]; *Palila v. Hawaii Dep't of Land & Natural Resources (Palila II)*, 852 F.2d 1106 (9th Cir. 1982).

It is worth noting that, in 1982, when Congress reauthorized the ESA and amended certain of its provisions, Congress was aware of these court decisions. *See* Endangered Species Act of 1973: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries (hereinafter "Hearings"), 97th Cong., 2d Sess. 291, 329, 331, 343 (1982). Moreover, the precise question at issue in this case arose in the House hearings on the proposed reauthorization bill. One panelist before the subcommittee, Ken Berlin of the National Audubon Society, pointed out that industry groups had been seeking to remove the word "harm" from the ESA's definition of "take" because they disagreed with the Secretary's interpretation of that word to include habitat modification. Hearings, at 290. In response to subsequent questioning by Congressman Edwin B. Forsythe, Robert Carlton of the National Forest Products Association and Mr. Berlin specifically addressed the issue of whether the statutory definition of "take" was intended to include habitat modification. Hear-

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[1] Both the *TVA v. Hill* and *Palila I* decisions were issued when a prior version of the Secretary's regulation was in effect; that prior version also defined "harm" to include habitat modification. The Secretary revised the language of the harm definition in 1981, but without changing its basic meaning. The final regulation simply clarified that habitat modification would not be considered a taking unless there was proof of attendant death or injury. *See* 46 Fed.Reg. 54,748 (November 4, 1981).

ings, at pp. 342-43. Rather than argue about statutory interpretation, Congressman William J. Tauzin turned the panelists' attention to the exemption process in Section 10(a) of the ESA, and the discussion subsequently focused on amending that section to promote its efficiency. *Id.* at 344-46. The reauthorization bill that was eventually adopted by Congress did not amend the original definition of "take" to exclude the word "harm" or to correct the Secretary's definition of that term. Instead, it amended the provisions of the Section 10(a) permit process "to encourage creative partnerships between the public and private sectors and among governmental agencies in the interest of species and habitat conservation." H.Rep. No. 835, 97th Cong., 2d Sess. 30 (1982).

Finally, the structure of the ESA supports the Court's conclusion that Congress intended "take" to be interpreted broadly, even to include habitat modification. Plaintiffs suggests that the § 17.3 definition of "harm" to include habitat modification makes the land acquisition provision of the ESA largely superfluous. However, as defendants point out, there is considerable overlap in the ESA between different provisions of different sections of the ESA, and this overlap is completely consistent with the statute's purpose of attacking the issue of conservation as aggressively as possible. The land acquisition provision of Section 5 offers a solution to the problem of habitat modification through federal spending; the take prohibitions of Sections 7 and 9 offer solutions through civil and criminal sanctions.

The Court thus concludes that the language, structure and history of the ESA reveal that Congress intended an expansive interpretation of the word "take," an interpretation that encompasses habitat

modification. However, even if the Court were somehow to find the ESA "silent or ambiguous" with respect to this issue, it would nevertheless uphold the Secretary's regulation as a reasonable interpretation of the statute. *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2781.

Plaintiffs have not addressed the question of the reasonableness of the Secretary's regulation under the second part of the *Chevron* test. In light of the statute's broad definition of "take," and the absence of any explicit language in the legislative history precluding habitat modification from the scope of that definition, the Court cannot conclude that § 17.3 is an impermissible construction of the statute. Were the Court to reach the second step in *Chevron*, therefore, it must defer to the Secretary's interpretation.

2. § 17.3 Is Not Void for Vagueness

Plaintiffs also claim that the Secretary's definition of "harm" violates the Fifth Amendment's due process guarantee against vague regulations. This constitutional challenge is purely facial; plaintiffs do not allege that they are being threatened with actual criminal enforcement of the regulation.

In general, the void for vagueness doctrine "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983). The primary purpose of the doctrine is to provide citizens with actual notice of offensive conduct, to prevent arbitrary enforcement of criminal laws, and to ensure that such laws establish minimal

guidelines to govern law enforcement. *Id.* at 358, 103 S.Ct. at 1858.

Defendants argue that, in order to succeed in their vagueness challenge, plaintiffs must demonstrate that the regulation is impermissibly vague in all of its applications. They point out that this is a facial challenge which does not implicate any "constitutionally protected conduct" such as expressive rights under the First Amendment. *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 389, 494, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982). Plaintiffs insist that § 17.3 implicates private property rights protected by the Fifth Amendment, and that therefore the broad standard of proof for vagueness outlined in *Flipside* should not apply to their "constitutionally protected conduct."

The Court agrees with plaintiffs that § 17.3 implicates private property rights protected under the Fifth Amendment. It cannot, however, conclude that such Fifth Amendment interests constitute "constitutionally protected conduct" within the meaning of *Flipside*. Rather, the Court must apply the familiar standard outlined in *United States v. Mazurie*, 419 U.S. 544, 550, 95 S.Ct. 710, 714, 42 L.Ed.2d 706 (1975): "[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand."

The facts of this case establish that the challenged regulation is not void for vagueness. The definition of "harm" found at § 17.3 clearly limits prohibited conduct to that which "actually kills or injures wildlife." 50 C.F.R. § 17.3. Furthermore, the regulation prohibits only "*significant* habitat modification or degradation," expressly defined as modification or

degradation which "actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." *Id.* (emphasis added) As defendants point out, the determination of whether there has been a violation of this regulation requires an evaluation of the species involved, the biological needs of that species, and the degree of habitat modification, all of which are readily ascertainable. Moreover, the regulation itself requires a finding that actual death or injury to a species has occurred. The terms of the regulation thus clearly provide more than "minimal guidelines" and are sufficiently clear to put a party on notice of prohibited conduct.

Finally, in order to establish a violation of the ESA under this regulation or any other, the government must prove that the charged party *knowingly* committed the violation. *See* 16 U.S.C. § 1540(a) & (b). This intent requirement goes a long way towards vitiating vagueness concerns, since it eliminates the possibility that a person will be prosecuted for conduct which he or she did not know was unlawful. Nor have plaintiffs offered any evidence, other than hypothetical possibilities, that the FWS is enforcing this regulation in an arbitrary and discriminatory manner. The Court therefore concludes that § 17.3 is not impermissibly vague.

B. *The Extension of the Taking Prohibitions at 50 C.F.R. § 17.31(a)*

The Secretary's regulation at 50 C.F.R. § 17.31(a) extends to threatened species all the protections that the ESA affords to endangered species. This regulation was promulgated under the authority set out

in Section 4(d) of the ESA, which states in pertinent part:

> Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title, in the case of fish or wildlife, ...

16 U.S.C. § 1533(d). Plaintiffs argue that § 4(d) imposes limitations on the Secretary's ability to extend the taking prohibitions for endangered species to threatened species. First, they claim that § 4(d) allows such extensions only on a species-by-species basis. Second, they argue that § 4(d) requires any such regulation to be accompanied by an explicit finding that the extension is "necessary and advisable" for the conservation of the threatened species.

The Court cannot accept plaintiffs' arguments. The plain language of the ESA clearly grants the Secretary the authority to promulgate a regulation such as § 17.31(a). Where a statute is clear and unequivocal on its face, a court's decision may rest on the words of the statute itself, at least where it is not manifestly inconsistent with legislative intent. *Gatewood v. Washington Healthcare Corp.*, 933 F.2d 1037, 1040 (D.C.Cir.1991); *Aviation Consumer Action Project v. Washburn*, 535 F.2d 101, 106 (D.C.Cir.1976). In this case, the language of the statute allows the Secretary to "prohibit with respect to *any* threatened species *any* act prohibited under section 1538(a)(1) of this title." 16 U.S.C. § 1533(d) (emphasis added).

The word "any" encompasses the entire range of threatened species and prohibited acts which the Secretary might consider. It allows the Secretary to prohibit one act with respect to one threatened species or as many as *all* acts with respect to *all* threatened species.

Nothing in the language or legislative history of the statute requires the Secretary to promulgate regulations under § 4(d) on a species-by-species basis. On the contrary, the statute gives the Secretary broad discretion to issue regulations "as he deems necessary and advisable." Plaintiffs' reading of this phrase as a requirement that the Secretary must issue some kind of "necessary and advisable" findings in conjunction with any promulgated regulation completely distorts the statutory language. The Secretary is not required to issue *findings* under § 4(d); he is required to issue regulations. To interpret the phrase as plaintiffs suggest would be to rewrite the statute.

The legislative history of the ESA offers no evidence that the Court's plain reading of the language of § 4(d) is "manifestly inconsistent with legislative intent." *Gatewood*, 933 F.2d at 1040. While the legislative record does contain statements which suggest that the Secretary would, under § 4(d), draft regulations on an individual basis for each threatened species, there is nothing in the record to suggest that he is *required* to do so. In fact, the Senate Report evidences Congress' awareness of, and acquiescence in, a more sweeping use of § 4(d). *See* S.Rep. No. 307, 93d Cong., 1st Sess. 8 (1973) (allowing the Secretary to make "any or all" of the acts prohibited for endangered species also prohibited as to threatened species.

The Court thus concludes that § 17.31(a) is not contrary to the ESA.

CONCLUSION

The Court concludes that both of the regulations challenged in this action, 50 C.F.R. § 17.3 and 50 C.F.R. § 17.31(a), are consistent with the ESA. Furthermore, § 17.3 is not void for vagueness. The Court thus will grant defendants' motion for summary judgment and deny plaintiffs' motion for summary judgment. An Order consistent with this Memorandum Opinion will be entered on this date.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed August 12, 1994

No. 92-5255

SWEET HOME CHAPTER OF COMMUNITIES
FOR A GREAT OREGON, ET AL., APPELLANTS

v.

BRUCE BABBITT, SECRETARY OF INTERIOR, ET AL.

On Appellees' Petition for Rehearing and
Suggestion for Rehearing *En Banc*

Before: MIKVA, *Chief Judge;* WILLIAMS and SENTELLE, *Circuit Judges.*

ORDER

Upon consideration of appellees' petition for rehearing, the response thereto, and the reply, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

Chief Judge MIKVA would grant the petition for rehearing and joins in the statement by *Circuit Judge* SILBERMAN dissenting from the Court's denial of appellees' suggestion for rehearing *en banc.*

A statement of *Circuit Judge* WILLIAMS, joined in by *Circuit Judge* SENTELLE, is attached.

Before: MIKVA, *Chief Judge*, WALD, EDWARDS, SILBERMAN, BUCKLEY, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, and ROGERS, *Circuit Judges*.

ORDER

Appellees' suggestion for rehearing *en banc*, the response thereto, and the reply, have been circulated to the full Court. The taking of a vote thereon was requested. Thereafter, a majority of the judges of the Court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam

Chief Judge MIKVA and *Circuit Judges* WALD, SILBERMAN, and ROGERS would grant the suggestion for rehearing *en banc*.

Separate statement filed by *Circuit Judge* SILBERMAN, dissenting from the denial of rehearing *en banc*.

WILLIAMS, *Circuit Judge*. In seeking rehearing, the government offers a number of ill-founded critiques of the panel opinion, 17 F.3d 1463 (D.C. Cir. 1994).

1. The government suggests broadly that the panel found the harm regulation, 50 C.F.R. § 17.3, invalid on the basis of false assumptions as to its meaning. See Petition for Rehearing and Suggestion for Rehearing En Banc 6-9. Specifically, the government contends that the panel (a) disregarded the regulation's requirement that the habitat modification involve "affirmative action which creates death or disturbance to essential behavioral patterns with sig-

nificant and permanent, injurious effects", Petition at 8, and (b) manifested its misunderstanding of the regulation by referring to third parties' claims made about necessary grizzly bear habitat, *id.* at 8-9.

It is the government that misrepresents the regulation. The Department of Interior in fact requires no "affirmative action." Quite the contrary. The Department carefully specified that there was no need to refer expressly to *omissions* because the text as a whole make clear that omissions were embraced as fully as acts of commission. *Final Redefinition of "Harm"*, 46 Fed. Reg. 54,748, 54,750 (Nov. 4, 1981) ("the phrase 'or omission' was deleted since the Service feels that 'act' is inclusive of either commissions or omissions which would be prohibited by section 9"). The Department inserted the word "actually" before "kills or injures" in its redefinition of harm merely to underscore the need for a causal link—a showing that the "significant and permanent effects" on the species have been "due to a party's action." *Id.* at 54,749.

Further, the grizzly example cited in the text, 17 F.3d at 1465, makes quite clear that the panel understood that the regulation addressed habitat modifications that would be *fatal* to members of the species. It refers to a contention that " 'as many as 35 million to 42 million acres of land are *necessary to the survival* of grizzlies'.". *Id.* (emphasis added). If that habitat is "necessary to [the grizzlies'] survival", then any material curtailment must involve death for members of the species.[1]

2. The government argues that the panel misstated the legislative history when it suggested a

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[1] Equally clearly, the panel did not endorse the specific claim of what acreage may actually be "necessary".

parallel between the ban on habitat modification *retained* in the Act as applied to federal government actors, 17 F.3d at 1466, and the "habitat modification" explicitly *deleted* from the draft provision governing private actors, *id.* at 1467. See Petition at 8. The panel made the point both in noting the apparent structure of the Act (contrasting the imposition of "very broad burdens" on a narrow segment of society, the federal government, and relatively narrow burdens on all others), and in suggesting the significance of the Senate Committee's deletion of the bill's reference to "habitat modification" as one of the ways in which a person might "take" members of an endangered species. The suggested parallelism is false, says the government, because the statutory ban on habitat modification by federal agencies is far broader, reaching such modifications "whether destruction of the habitat would actually kill or injure the species". Petition at 8.

Again the government misrepresents. The panel quoted the provision applying to the government, "destruction or adverse modification of habitat . . . which is determined . . . to be *critical*", § 7(a)(2), Endangered Species Act, 16 U.S.C. § 1536(a)(2) (emphasis added (quoted in 17 F.3d at 1466). The statute in turn defines "critical habitat" in terms of characteristics "*essential* to the conservation of the species", 16 U.S.C. § 1532(5)(A)(i) & (ii) (emphasis added), which seems to be simply another way of referring to habitat modifications so significant to the species that they might lead to death (or at least some very serious injury) for members of the species. In looking at the Department's regulations discussing modifications of "critical" habitat under § 7, and habitat modifications that are forbidden under the Department's view of § 9, we are unable to discern any substantive, operational difference, and the gov-

ernment has not identified any. Compare, e.g., 50 CFR § 17.94 (regulations implementing § 7 preclude "destruction or adverse modification of the constituent elements *essential to conservation* of the listed species") (emphasis added) with 46 Fed. Reg. 54,748, 54,750 ("[t]o be subject to section 9, the modification or degradation must be *significant*, must *significantly impair essential* behavioral patterns, and must result in *actual* injury to a protected wildlife species") (emphasis in original). If there are "essential" habitat elements whose removal or destruction causes no injury, the government cites no example and it is hard to imagine one. Michael Bean, Senior Counsel for the Environmental Defense Fund, recognized the virtual identity between what the Senate deleted from § 9 and what it retained in § 7 when he wrote, not long after the Act passed, "if 'taking' comprehends habitat destruction, then it is at least doubtful whether Section 7 of the Act is even necessary." Michael J. Bean, *The Evolution of National Wildlife Law* 397 (1977). But see Michael J. Bean, *The Evolution of National Wildlife Law* 342 (Revised & Expanded Edition 1983).

To the extent that there may be some theoretical difference between habitat modification under § 7 and under the Department's regulations purporting to implement § 9, practical realities limit its role to pure theory. As noted in the panel opinion, § 10(a) authorizes the advance issuance of permits for "incidental taking". 17 F.3d at 1467-68. As a practical matter, persons whose extended conduct might be found a "take", and who thus are exposed to the criminal penalties of 16 U.S.C. § 1540(b) (see also 18 U.S.C. §§ 3559(a)(6), 3571(b) & (e)), are under commanding pressure to comply with § 10(a) plans. The Department recognizes this reality. "Much of the pri-

vate land which would be covered by the long-term HCP [habitat conservation plan] cannot be developed due to the prohibitions of section 9 of the Act. In order for many planned development projects to proceed in compliance with the Act, a permit for incidental take must be obtained." *Notice of Intent to Prepare an Environmental Impact Statement to Allow Incidental Take of the Threatened Desert Tortoise (Gopherus agassizii) Under Section 10(a)(1)(B) of the Endangered Species Act and Notice of Public Meetings*, 59 Fed. Reg. 5439 (Feb. 4, 1994). And the Department explicitly recognizes the restrictions that it imposes under § 10(a) as "equivalent" to those it imposes under § 7 to protect "critical habitat". See *Special Rule Concerning Take of the Threatened Coastal California Gnatcatcher*, 58 Fed. Reg. 65,088, 65,089-90 (Dec. 10, 1993) (taking permitted under § 10(a) plan for California gnatcatcher "will not appreciably reduce the likelihood of survival and recovery of the gnatcatcher in the wild. This criterion is *equivalent* to the regulatory definition of 'jeopardy' under section 7(a)(2) of the Act") (emphasis added).[2]

3. To the extent that the government seeks to convey the impression that its enforcement of the harm regulation never entails the exercise of power over large tracts of land, the impression is false. The Department's § 10(a) plans, into which § 9 collapses de facto, are often sweeping. The plan to protect the

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[2] Technically the restrictions were under § 4(d) of the Act, 15 U.S.C. § 1533(d), because the gnatcatcher is not an endangered but a "threatened" species. But the Department by regulation has made the anti-take provisions fully applicable to threatened species, so the rule in effect implements § 9 (through the lens of § 10(a)). See *Sweet Home Chapter v. Babbitt*, 1 F.3d 1, 5-8 (1993).

California gnatcatcher, for example, covers 3.8 million acres. *Special Rule Concerning Take of the Threatened Coastal California Gnatcatcher*, 58 Fed. Reg. at 65,090.

* * * * *

The government faults the panel for failing to specify whether the regulation's excess of statutory authority failed under the first or second "step" of the analysis set forth in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), Petition at 9-10, and in a more general way for failing to give the agency the deference that is its due under *Chevron*. Because the court in determining whether Congress "unambiguously expressed" its intent on the issue, see 467 U.S. at 843, is to employ all the "traditional tools of statutory construction", *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987), the factors involved in the first "step" are also pertinent to whether an agency's interpretation is "reasonable". Thus the exact point where an agency interpretation falls down may be unclear. (Indeed, the *Chevron* Court itself never specified which step it was applying at any point in its analysis, see 467 U.S. at 859-66.)

Nonetheless, we conclude that the statute, fairly read in the light of the "traditional tools of statutory interpretation", manifests a clear determination by Congress that the prohibition of § 9 should not reach habitat modifications as defined by the Department, where there is no direct action by the defendant against any member of the species. Extending the word "harm" to reach habitat modification as so conceived carries § 9's prohibition far beyond the reach effected by all the other terms used in the definition; it applies to every citizen duties the Act expressly im-

posed only on federal government agencies; and it ignores the plausible inferences from the Senate's deletion of the phrase "habitat modification" from the draft bill. The extension vests the Department with authority to supervise the use of privately owned land in vast tracts of the United States, even to the point of forbidding modest clearing efforts conducted in the interest of fire protection in populated areas. See *Determination of Threatened Status for the Coastal California Gnatcatcher*, 58 Fed. Reg. 16,742, 16,753 (March 30, 1993); *Determination of Endangered Status for the Delhi Sands Flower-loving Fly*, 58 Fed. Reg. 49,881, 49,884-86 (Sept. 23, 1993) (destruction of species habitat by removal of native vegetation for fire prevention on private land could be interpreted to constitute take); (fly "rare to absent" in former habitat sites currently "degraded by ongoing soil disturbances, caused by grading, plowing, discing, to remove vegetation for fire control, and off-road vehicle use", *id.* at 49,884/3-85/1/ destruction of habitat "could be interpreted to constitute take", *id.* at 49,886/2). Congress clearly did not hang so massive an expansion of government power on so slight a nail as § 9's provision that no one should "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" an endangered species.

The petition for rehearing is

Denied.

SILBERMAN, *Circuit Judge*, dissenting from the denial of rehearing *en banc*, with whom MIKVA, *Chief Judge*, and WALD, *Circuit Judge*, join: I find this case quite troublesome, as much for what is not argued by the parties, and therefore not discussed by the court, as for what is. Keeping in mind that we are dealing with a criminal statute, I am not at all sure that *Chevron* even governs our review. *Cf. United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2110 & nn.9 & 10 (1992) (plurality opinion). That is to say, the *Chevron* presumption—that Congress has delegated to the administrating agency primary authority to reconcile ambiguities in statutory language—may not apply when the statute contemplates criminal enforcement. *Cf. Kelley v. EPA*, 15 F.3d 1100, 1007 (D.C. Cir. 1994). The petitioner does not raise that concern, but it surely is not a separate claim that the petitioner has affirmatively waived.

It is, therefore, not necessary in order to direct briefing on that question to rely on *United States Nat'l Bank v. Independent Ins. Agents, Inc.*, 113 S. Ct. 2173 (1993), in which the Supreme Court proclaimed unrestrained judicial discretion to decide any issue analytically anterior to the controversy before it, even if the plaintiff affirmatively waived the claim (which means, I gather, in the typical contract breach suit where both parties agree that the contract was formed but dispute only whether there was a breach, a federal court *can, sua sponte*, force the parties to litigate whether the contract was actually formed). Since the Court did not even purport to announce a rule governing this sort of discretion (which some might think implies that its opinion on this issue is not even law), I take it that no federal judge is bound

to exercise the discretion that the Supreme Court obviously wished to preserve for itself.[1]

Indisputably, however, ripeness issues which go to our jurisdiction should be raised by a federal court *sua sponte*, and I rather doubt the ripeness of the appellant's facial challenge to the Department of Interior regulation. I can imagine a string of hypotheticals which range from "habitat modifications" that are sufficiently close to the core concept that the majority believes animates the statutory language as to be surely included within the word "harm" to ones that seem clearly inconsistent with the statute. Suppose, for example, that someone wished to kill all the birds on a particular piece of property and could do so by draining a marsh. If that person did so, would not his actions properly be thought to "harm" the endangered species?

Assuming the challenge to the regulation is ripe and that *Chevron* controls our review, I think the Chief Judge has the better of the argument. Were I interpreting this statute with deference, given its language and legislative history, I would certainly be troubled about any construction that might preclude a landowner from using his property for ordinary purposes just because it could be thought that an endangered species was somehow disadvantaged. I do not think, however, that the majority has submitted to the discipline of the *Chevron* framework and given the Department of Interior its due defer-

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[1] It has recently been suggested that the Supreme Court is really a quasi-judicial institution. *See* Thomas W. Merrill (the John Paul Stevens Professor at Northwestern), *A Modest Proposal For a Political Court*, 17 HARV. J.L. & PUB. POL'Y, 137, 139 (1994).

ence. It was certainly not apparent whether the majority's initial opinion rested on *Chevron* Step I or Step II. In its response to the government's petition for rehearing, the panel majority appears to shift perceptibly to a Step I "clear determination by Congress," against which no deference to the agency's interpretation is appropriate. I do not find in either the statutory language or the legislative history any such fixed view. And at the second step (which is where I would analyze the case), maxims of statutory construction like *noscitur a sociis*, although not totally irrelevant, certainly have less force. *See Michigan Citizens for an Indep. Press v. Thornburgh*, 868 F.2d 1285, 1292-93 (D.C. Cir.), *aff'd per curiam by an equally divided court*, 493 U.S. 38 (1989). I quite agree with the panel that "the factors involved in the first 'step' are also pertinent to whether an agency's interpretation is 'reasonable,'" *see* Silberman, Chevron—*The Intersection of Law & Policy*, 58 GEO. WASH. L.REV. 821, 827 (1990); but when thinking of the statute at that second step, one must assume that the statute has more than one plausible construction as it applies to the case before you. If the agency offers one—it prevails.

In any event, the issue would seem of sufficient importance, particularly in light of the circuit split, *cf. Palila v. Hawaii Dep't of Land and Natural Resources*, 852 F.2d 1106 (9th Cir. 1988), to warrant *en banc* treatment.

APPENDIX E

[Filed Mar. 11, 1994]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-5255

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, ET AL., APPELLANTS

v.

MANUEL LUJAN, JR., Secretary of Interior, ET AL.

BEFORE: Mikva, Chief Judge; Williams and Sentelle, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing and of the response thereto, it is

ORDERED, by the Court, that the petition is granted, as is set forth in the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
RON GARVIN
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Date: March 11, 1994

Opinion for the court on petition for rehearing filed by Circuit Judge Williams.

Concurring opinion filed by Circuit Judge Sentelle.

Dissenting opinion filed by Chief Judge Mikva.

APPENDIX F

[Filed Mar. 11, 1994]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-5255

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, ET AL., APPELLANTS

v.

MANUEL LUJAN, JR., Secretary of Interior, ET AL.

BEFORE: Mikva, Chief Judge; Wald, Edwards, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges

ORDER

Appellant's Suggestion For Rehearing *In Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *in banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT:
RON GARVIN
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX G

STATUTORY PROVISIONS

The Endangered Species Act of 1973, as amended and codified at 16 U.S.C. 1531 *et seq.*, provides in relevant part:

§ 1532. Definitions

For the purposes of this chapter—

* * * * *

(19) The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

* * * * *

§ 1536. Interagency cooperation

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or

result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d) of this section.

(b) Opinion of Secretary

(1)(A) Consultation under subsection (a)(2) of this section with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is

mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)—

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth—

(I) the reasons why a longer period is required,

(II) the information that is required to complete the consultation, and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) of this section shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2) of this section, and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371 (a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

(c) Biological assessment

(1) to facilitate compliance with the requirements of subsection (a)(2) of this section, each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary ad-

vises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

(d) Limitation on commitment of resources

After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of re-

sources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

* * * * *

(h) Grant of exemption

(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g)(5) of this section. The Committee shall grant an exemption from the requirements of subsection (a)(2) of this section for an agency action if, by a vote of not less than five of its members voting in person—

(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g)(4) of this section and on such other testimony or evidence as it may receive, that—

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

(iii) the action is of regional or national significance; and

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of

resources prohibited by subsection (d) of this section; and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of Title 5.

(2)(A) Except as provided in subparagraph (B), an exemption for an agency action granted under paragraph (1) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action—

(i) regardless whether the species was identified in the biological assessment; and

(ii) only if a biological assessment has been conducted under subsection (c) of this section with respect to such agency action.

(B) An exemption shall be permanent under subparagraph (A) unless—

(i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of a species that was not the subject of consultation under subsection (a)(2) of this section or was not identified in any biological assessment conducted under subsection (c) of this section, and

(ii) the Committee determines within 60 days after the date of the Secretary's finding that the exemption should not be permanent.

If the Secretary makes a finding described in clause (i), the Committee shall meet with respect to the matter within 30 days after the date of the finding.

* * * * *

(*o*) Exemption as providing exception on taking of endangered species

Notwithstanding sections 1533(d) and 1538(a)(1)(B) and (C) of this title, sections 1371 and 1372 of this title, or any regulation promulgated to implement any such section—

(1) any action for which an exemption is granted under subsection (h) of this section shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and

(2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) of this section shall not be considered to be a prohibited taking of the species concerned.

* * * * *

§ 1538. Prohibited acts

(a) Generally

(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section

1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

* * * * *

§ 1539. Exceptions

(a) Permits

(1) The Secretary may permit, under such terms and conditions as he shall prescribe—

(A) any act otherwise prohibited by section 1538 of this title for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts

necessary for the establishment and maintenance of experimental populations pursuant to subsection (j) of this section; or

(B) any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

(2)(A) No permit may be issued by the Secretary authorizing any taking referred to in paragraph (1)(B) unless the applicant therefor submits to the Secretary a conservation plan that specifies—

(i) the impact which will likely result from such taking;

(ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;

(iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and

(iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

(B) If the Secretary finds, after opportunity for public comment, with respect to a permit application and the related conservation plan that—

(i) the taking will be incidental;

(ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;

(iii) the applicant will ensure that adequate funding for the plan will be provided;

(iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and

(v) the measures, if any, required under subparagraph (A) (iv) will be met;

and he has received such other assurances as he may require that the plan will be implemented, the Secretary shall issue the permit. The permit shall contain such terms and conditions as the Secretary deems necessary or appropriate to carry out the purposes of this paragraph, including, but not limited to, such reporting requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with.

(C) The Secretary shall revoke a permit issued under this paragraph if he finds that the permittee is not complying with the terms and conditions of the permit.

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Supreme Court, U.S.
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No. 94-859

In The Supreme Court of the United States

October Term, 1994

Bruce Babbitt, Secretary of the United States Department of the Interior, *et al.*,
Petitioners,

v.

Sweet Home Chapter of Communities for a Great Oregon, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTION PRESENTED

Under Section 9(a)(1) of the Endangered Species Act of 1973, 16 U.S.C. § 1538(a)(1), it is unlawful for any person to "take" an endangered fish or wildlife species. The Act defines "take" as meaning "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The question presented is:

Whether the U.S. Fish and Wildlife Service's regulation defining "harm" was correctly held invalid by the court below to the extent that it prohibits ordinary land uses which are not directed against protected wildlife but which may inadvertently injure such wildlife?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-859

BRUCE BABBITT, Secretary of the United States Department of the Interior, *et al.*,
Petitioners,

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents [1] respectfully pray that the Court deny the Petition filed by Secretary of the Interior Bruce Babbitt and United States Fish and Wildlife Service Director Mollie H. Beattie (collectively, "Petitioners" or "FWS").

STATEMENT

The two main opinions below (Pet. App. 1a-24a and 89a-96a) fairly set forth the facts and law necessary to dispose of this Petition. Sweet Home supplements the Petitioners' statement of the case in a few respects below.

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[1] Pursuant to this Court's Rule 29.1, the corporate Respondents (Erickson Busheling, Inc.; Ridgetree Logging Co.; Shotpouch Logging Co.) are privately held corporations, with no parent or subsidiary companies. The individual, corporate and association Respondents will be collectively referred to as "Sweet Home."

1. Section 9 of the Endangered Species Act ("ESA" or "Act") makes it unlawful for any "person" (which includes all private and public entities, *see* 16 U.S.C. § 1532(13)) to "take" any "endangered species of fish or wildlife listed pursuant to section 1533."[2] "'[T]ake' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). FWS's regulation defines "harm" to include a land use action which modifies habitat (*e.g.*, clearing brush, plowing fields, cutting trees) if the action indirectly leads to the death or "injury" of listed wildlife:

> **Harm** in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3.

Violations of the "harm" regulation may be prosecuted criminally, with penalties of up to one year in jail and a $200,000 fine for each "take."[3] Civil penalties and in-

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[2] 16 U.S.C. § 1538(a)(1)(B). The Petition (at 4 and n.2) incorrectly states that "the 'take' prohibition applies to all listed species." "Take" applies only to listed *wildlife* species, since § 9(a)(1) applies to endangered "fish or wildlife" and 50 C.F.R. § 17.31(a) extends the "take" prohibition to most threatened "wildlife." There is no ESA provision on "take" of listed *plant* species and a landowner may remove and destroy a listed *plant* species. 16 U.S.C. § 1538(a)(2).

[3] 16 U.S.C. § 1540(b); 18 U.S.C. §§ 3559, 3571. The "knowingly" standard under § 1540(b) apparently would require only a general intent to perform an act, not a specific intent to violate the law. *E.g., United States v. Nguyen*, 916 F.2d 1016 (5th Cir. 1990). Thus, a person who intentionally cuts a tree and thereby unintentionally injuries listed wildlife may well be criminally liable under the "harm" regulation.

junctive relief are also available. 16 U.S.C. § 1540(a), (e)(6) and (g).

2. After the "harm" regulation was used to impose restrictions on Respondents' timber harvesting, Respondents filed this suit to allege that the "harm" regulation's application to ordinary land uses violated the ESA. *See* Complaint at ¶¶ 4-14, 17-27. This *ultra vires* challenge —the first such challenge ever brought—was rejected in the district court (Pet. App. 73a) and initially in the court of appeals in a conclusory 2-1 *per curiam* opinion (Pet. App. 46a).

Judge Sentelle dissented from the initial *per curiam* opinion based on a straightforward reading of the Act's "take" definition; he would have found the "harm" regulation adopted by the FWS exceeded the agency's powers under the Act. Pet. App. 68a. Judge Williams, in a separate opinion, indicated his agreement that the "harm" regulation could not be squared with the language of the 1973 ESA, but he believed that the 1982 ESA amendments could be read to impliedly ratify the rule. Pet. App. 67a. He therefore joined with Judge Mikva (Pet. App. 59a) to uphold the regulation.

3. Sweet Home's petition for rehearing was directed in part at the legislative ratification theory which Judge Williams initially had found persuasive. Judge Williams, on rehearing, agreed with Sweet Home's position and authored the March 11, 1994 majority opinion. Pet. App. 1a-24a (17 F.3d 1463). Relying on the Act's definition of "take," its overall structure, and its legislative history, the court concluded that the "harm" regulation is invalid in "embrac[ing] habitat modifications." Pet. App. 24a.

Since "harm" can have narrow and broad meanings, the court looked to the way the term was used in the Act. This common sense approach is encapsulated in the *noscitur a sociis* principle—that indefinite words in a list (such as "harm" in the list of words comprising the ESA

definition of "take") derive meaning from neighboring words. Pet. App. 3a-6a. The court noted that each of the other terms in the Act's definition of "take" involve "a substantially direct application of force, which the Service concept of forbidden habitat modification altogether lacks." Pet. App. 5a-6a.[4] Thus, the court found that, when "harm" is read in its ESA context, FWS's interpretation of that term is impermissibly broad.

The court then considered the relationship among the ESA's different sections. It noted, in particular, that the Act "pursues its conservation measures through three basic mechanisms:" (1) a federal land acquisition program under § 5 (16 U.S.C. § 1534); (2) the imposition, under § 7 (*id.* § 1536), of strict obligations on federal agencies to avoid adverse impacts on endangered species; and (3) § 9's prohibition (*id.* § 1538) on the taking of endangered species by anybody. Pet. App. 7a. It concluded that the structure of the ESA is rational and nonconflicting only if § 7 "imposes very broad burdens on the [federal government], including the avoidance of adverse habitat modifications," while § 9's "take" and other prohibitions place on "every person . . . [only] relatively narrow" burdens. Pet. App. 7a-8a.

Thus, by its interpretation of the ESA § 9 concept of "harm" to prohibit any ordinary land use (*i.e.*, a "habitat modification") by any public or private entity whenever the use happens to injure *one* member of a listed wildlife species, FWS eliminates any need for ESA § 7(a)(2), which imposes duties on a "Federal agency" to not "jeopardize the continued existence" of an *entire* listed species

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[4] As the opinion notes, the Ninth Circuit applied this principle to similarly limit the "take" prohibition under the Marine Mammal Protection Act to a "direct" intrusion against the listed species. Pet. App. 5a, *quoting United States v. Hayashi*, 5 F.3d 1278, 1282 (9th Cir. 1993). Though FWS sought rehearing *en banc* in *Hayashi*, the effort was unsuccessful. The opinion, reported at 22 F.3d 859 (9th Cir. 1994), reaffirms *Hayashi* with a few minor language changes.

or cause the "destruction or adverse modification of [the designated critical] habitat" of such species.[5] The "harm" regulation has unlawfully "transposed to the private" sector habitat protection duties which the ESA places only on the federal sector.[6] Pet. App. 7a.

The court next examined the ESA legislative history, which confirmed that "harm" and other ESA "take" components cannot fairly be read to encompass ordinary land uses which adversely modify habitat. First, the ESA floor managers for both the House and Senate "differentiated loss of habitat [which would be addressed through compensatory land acquisition under ESA § 5] from the hazard that was the target of the 'taking' ban." Pet. App. 9a. ESA § 5 (16 U.S.C. § 1534) provided "funds for acquisition of critical habitat" precisely because Congress only desired cooperation with "willing landowners"—Congress did not want to prohibit land uses as "takes" without compensation. 119 Cong. Rec. 30162 (Sept. 18, 1973) (remarks of House floor manager Sullivan), *quoted in* Pet. App. 8a-9a.

Second, Congress "deliberate[ly] delet[ed] habitat modification from the definition of 'take'" despite environmental group testimony that the language was needed to prevent land uses which indirectly injure

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[5] *See* Pet. App. 92a-93a. If "harm" prevents anyone from adversely modifying habitat to the detriment of even one individual member of a listed species, as FWS's regulation asserts, "then it is at least doubtful whether Section 7 of the Act is even necessary." M. Bean, *The Evolution Of National Wildlife Law* 397 (GPO 1977), *quoted in* Pet. App. 93a.

[6] The power that ESA § 7 vests in the "federal sector" is broader than first meets the eye. The federal agency duties under § 7(a)(2) apply not only to all activities on all federal lands, but also to the myriad of activities on private lands that cannot occur without federal agency action—such as the funding of a project or the issuance of a permit. As many major private land projects require some sort of federal authorization, § 7 by itself constitutes a significant mechanism for controlling habitat modification activities on private lands.

listed wildlife. Pet. App. 9a-10a. The "harm" regulation unlawfully attempts to adopt by regulation a concept—"take" includes habitat modifications which inadvertently injure listed wildlife—that Congress deleted from the ESA. *See id.*

Finally, the court concluded that the 1982 ESA amendments could not and did not retroactively ratify the 1981 "harm" regulation. Pet. App. 10a-24a. Judge Sentelle joined in the majority opinion and filed a short concurring opinion. Pet. App. 25a. Judge Mikva, finding "the legislative history to be most ambiguous regarding whether Congress intended to include habitat modification within the meaning of 'take,' " dissented on the ground that *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), required deference to FWS's interpretation. Pet. App. 34a.

4. The legality of the "harm" regulation was briefed a third time at the appellate level when FWS sought rehearing. On August 12, the full D.C. Circuit announced a 7-4 vote to deny rehearing *en banc*, and two opinions were filed. Pet. App. 89a-99a (30 F.3d 190). Judge Williams' opinion denying a panel rehearing summarizes how the "harm" regulation exceeds statutory limits:

> [T]he statute, fairly read in light of the "traditional tools of statutory interpretation," manifests a clear determination by Congress that the prohibitions of § 9 should not reach habitat modifications as defined by the Department [of the Interior], where there is no direct action by the defendant against any member of the species. Extending the word "harm" to reach habitat modification as so conceived carries § 9's prohibition far beyond the reach effected by all the other terms used in the definition; it applies to every citizen duties the Act expressly imposed only on federal government agencies; and it ignores the plausible inferences from the Senate's deletion of the phrase "habitat modification" from the draft bill. The extension vests the Department with authority to

> supervise the use of privately owned land in vast tracts of the United States, even to the point of forbidding modest clearing efforts conducted in the interest of fire protection in populated areas. . . . Congress clearly did not hang so massive an expansion of government power on so slight a nail as § 9's provision that no one should "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" an endangered species.

Pet. App. 95a-96a.

Judge Silberman filed a dissenting opinion, joined in by two other judges. He urged *en banc* review and favored argument on the question whether, "[k]eeping in mind that we are dealing with a criminal statute, . . . *Chevron* even governs our review." Pet. App. 97a. Although he stated that he would likely have accorded more deference to the agency's interpretation than did the panel if *Chevron* did apply, Judge Silberman too was troubled by the breadth of the "harm" regulation:

> Were I interpreting this statute without deference, given its language and legislative history, I would certainly be troubled about any construction that might preclude a landowner from using his property for ordinary purposes just because it could be thought that an endangered species was somehow disadvantaged.

Pet. App. 98a.

REASONS FOR DENYING THE WRIT

The Petition to review this statutory interpretation case should be denied. In the course of three separate visits to the court below and review by all of its judges, this case has been thoroughly considered and thoughtfully decided. Although Petitioners argue that the decision is wrong (Pet. at 12-21), an allegedly incorrect result does not warrant review unless the decision below "has so far departed from the accepted and usual course of judicial proceedings" that it calls out for this Court's supervisory

review. Rule 10.1(a). This case does not meet the exacting standard.[7]

1. Petitioners' lead argument—that this is a "facial" challenge to the "harm" regulation, and that Sweet Home failed to meet its alleged burden of showing the absence of any circumstances under which the regulation would be valid (Pet. at 12-13)—is a red herring.

Notably, the importance FWS assigns to the "facial" nature of the challenge escaped the attention of any of the judges below, whether in the majority or the dissent. FWS did not present to the district court, the original panel, or the rehearing or *en banc* panels, the authority it now emphasizes as the appropriate standard for reviewing a "facial challenge." It is therefore difficult to see how this undiscussed issue could be a proper focal point for a grant of certiorari.

Moreover, the judges below did not have to wrestle with the conceptual difficulties raised by the "facial challenge" argument because the argument leads nowhere. FWS adopted a "harm" definition that prohibits, indeed criminalizes, actions which unintentionally injure listed wildlife. The court below held that such a definition sweeps too broadly because it leaves out an essential element of the type of conduct meant to be prohibited by ESA § 9—an action which is directed at listed wildlife. Thus, the court's decision can only be read as invalidating the "harm" regulation to the extent that it encompasses ordinary land use actions which are taken for a legitimate

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[7] The Court has recently denied review in similar statutory interpretation cases where the courts below had adopted narrowing interpretations of the Clean Water Act. *E.g.*, *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 322 (1994); *Atlantic States Legal Foundation v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1993), *cert. denied*, 115 S. Ct. 62 (1994); *United States v. Plaza Health Laboratories*, 3 F.3d 643 (2d Cir. 1993), *cert. denied sub nom. United States v. Villegas*, 114 S. Ct. 2764 (1994).

purpose and are not directed against such wildlife. *See* Pet. App. 95a.

What this means, of course, is that the "harm" regulation is overbroad in every application: it authorizes injunctive relief and criminal penalties upon a mere showing that the innocent use of one's land has the unintended effect of injuring listed wildlife.

It is unavailing to suggest (*e.g.*, Pet. at 25-26) that there might be theoretical circumstances in which "habitat modification" might be purposefully used to eliminate listed wildlife from a site. That is not an issue: such an action, if directed at wildlife, can be prohibited or punished under the Act as it is currently written.[8] But under the "harm" regulation, a court or agency applying the statute would never reach that narrow universe of applications involving actions actually directed against wildlife because it is sufficient that an action affects the subject wildlife.

The various narrowing constructions FWS suggests concern a different point entirely—and thus do not meet the fundamental flaw in the regulation, identified by the decisions below. FWS focuses on the regulation's requirement that prohibited habitat modification be "significant," and that it "actually" as opposed to "potentially" cause injury (Pet. at 19). This goes to the class of prohibited effects; the concern of the court of appeals lay elsewhere, in the way the regulation addressed the actions causing those effects. What rendered the "harm" regulation fundamentally inconsistent with the other words defining "take"

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[8] If the actions are not directed against listed wildlife, of course, FWS can prevent any significant adverse effects they might have under the Act's other provisions—by designating "critical habitat" on public or private land under § 4, 16 U.S.C. § 1533(b)(2), by prohibiting or conditioning potentially adverse federal actions that are likely to adversely modify the critical habitat or otherwise jeopardize the species' continued existence under § 7, *id.* § 1536, or by acquiring sensitive lands and waters under § 5, *id.* § 1534.

and the overall structure of the Act was that it prohibited, indeed criminalized, actions of private citizens which merely affected wildlife, but which were not, in any respect, directed against wildlife.

Moreover, this is not a case where the regulation is new and there is doubt about its manner of application. FWS has made it clear that the "harm" regulation means precisely what it says and has repeatedly applied it to convert the ESA into a vehicle for constraining ordinary land uses by private citizens, where the inadvertent effect of those land uses may be injury to listed wildlife. The Petition itself describes some of those applications and some resulting court decisions in enforcement cases. Pet. at 19-21.

As such, this case is in no respect like *Reno v. Flores*, —— U.S. ——, 113 S.Ct. 1439 (1993), on which Petitioners principally rely for their "facial challenge" argument. There, the regulation had never "been applied in a particular instance" (*id.* at 1446), and much of the challenge was based on a fear—unsupported by evidence —that the regulation might be applied in ways that would raise special problems. *E.g.*, *Reno*, 113 S.Ct. at 1451 (absence of specific time period for hearing does not invalidate regulation because court cannot simply "assume, on . . . facial challenge, that an excessive delay will invariably ensue"). Here, in contrast, the "harm" regulation has been used to constrain timber harvesting by Respondents and others similarly situated, and that manner of application formed the basis for this suit.[9]

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[9] *See* Complaint ¶¶ 4-14, 23-26; Pet. at 8 (Respondents "are engaged in, or depend upon timber harvesting" and "allege that they are affected by the 'harm' regulation because of its application to the northern spotted owl" and red-cockaded woodpecker); Pet. App. 76a (similar description by district court). For example, FWS's "owl guidelines" interpreted "harm" to require that timber harvesting be avoided on up to 3,960 acres surrounding each spotted owl nest site, without any evidence or even allegation

2. As the foregoing suggests, there is nothing remarkable about the decision below. The court of appeals interpreted a single word in a single statute. Its interpretation that the "take" prohibition in ESA § 9 does not extend to ordinary land use actions which may inadvertently injure listed wildlife, as it would under the "harm" regulation, accords with everyday understandings. As Judge Sentelle observed:

> I have in my time seen a great many farmers modifying habitat. They modify by plowing, by tilling, by clearing, and in a thousand other ways. At no point when I have seen a farmer so engaged has it occurred to me that he is taking game. Nor do I think it would occur to anyone else that he was taking wildlife.

Pet. App. 69a.

The court's analysis of the issue began, of course, with the statutory text. Observing that "the nine verbs accompanying 'harm' [in the Act's definition of "take"] all involve a substantially direct application of force," the court reasoned that the term "harm" had been used in that sense as well. Pet. App. 5a. It thus applied the *noscitur a sociis* principle to understand the meaning of "harm" as used in the Act and thereby "avoid the giving of unintended breadth to the Acts of Congress." Pet. App. 5a-7a, *quoting Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). It is here that FWS launches its principal attack on the court's decision. But its three arguments are easily dealt with, and provide no basis for this Court's review.

Petitioners first offer two dictionary definitions to show that "harm" can be broadly used. Pet. at 13. This proves nothing since "harm" can also have narrow meanings,[10]

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of injury to, or intention to injure, a single spotted owl. Complaint ¶ 24; *see* A. Gidari, *The Endangered Species Act: Impact of Section 9 on Private Landowners*, 24 Envtl. L. 419, 426-40 (1994).

[10] Every dictionary adheres to the principle that, where a word has two or more meanings, the *context* in which it is used is the

as the court below acknowledged. Pet. App. 3a-4a. The issue is how it was used here. The *noscitur a sociis* principle avoids giving "harm" a breadth that Congress never intended in the Act. The court's use of that principle was particularly appropriate since "harm" was added to the list of "take" terms, with no discussion, as part of a package of 24 "technical" amendments on the Senate floor. 119 Cong. Rec. 25682-83 (July 24, 1973). To give the term a meaning that would subsume and expand dramatically upon all the others was simply implausible.

FWS next claims that the court's reliance on *noscitur a sociis* was misplaced. It argues, without citing any authority, that "that proposition . . . has no merit here," and apparently seeks to bolster that assertion by dividing —without reference to a dictionary this time—the component terms of the Act's "take" definition into two categories. Pet. at 14. Apart from its own weightlessness, this argument overlooks the court's company in applying the principle. The Ninth Circuit, with which FWS claims the decision below is in conflict, relied on *noscitur a sociis* to similarly limit the "take" definition under the Marine Mammal Protection Act. In *Hayashi*, 22 F.3d at 864, that Circuit held that "harass" (contrary to FWS's effort to portray the same term in the ESA as a benign term that 'weighs against the court of appeals' crabbed interpretation" (Pet. at 14)) must involve a "direct intrusion" against a listed species to be a "take." Even more strikingly opposed to its present position, FWS itself, in a published legal opinion, applied *noscitur a sociis* and found it meant that the ESA "term 'harm' should be interpreted

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surest guide to its meaning. The same dictionary FWS relies on (though an earlier version, to reflect usage when the ESA was passed) to show that "harm" means "injure" (Pet. at 13) defines "injure" as meaning "to inflict bodily hurt on" and notes that "HARM stresses the inflicting of pain." *Webster's Third New International Dictionary (Unabridged)* 1164 (Merriam 1968). That meaning would certainly be consistent with the conclusion below that "harm" refers to actions substantially directed at wildlife. *E.g.*, Pet. App. 4a-9a.

to include only those actions that are *directed against*, and likely to injure or kill, individual wildlife"—a meaning that closely parallels the result reached by the court below. 46 Fed. Reg. 29491 (June 2, 1981) (emphasis added).[11]

Finally, FWS makes the alternative argument that the court employed the wrong unifying theme in applying *noscitur a sociis*. Instead of the "substantially direct application of force" concept applied by the court, FWS prefers, once again with no supporting authority, a concept centering on conduct that will "result in some reasonably ascertainable and proximate injury (or death) to the protected species." Pet. at 16. This not only, again, puts FWS at odds with both the Ninth and D.C. Circuits, but also distances the agency from the ordinary meaning of "take"—"to get into one's hands or into one's possession," or "to catch, seize, or attack through the effect of a sudden force or influence." *Webster's Third New World Dictionary of the English Language (Unabridged)* 2329 (1968).

3. With no more than this, there is little reason for this Court to exercise its discretionary review power. This conclusion is all the more apparent in light of FWS's failure to rebut the strongest indicators of the will of Congress. First, FWS's interpretation of "harm" makes large parts of ESA §§ 5 and 7 superfluous, while the D.C. Circuit's interpretation retains a rational structure

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[11] If "harm" does refer to actions that are directed at and do injure wildlife, it would not make "harm" surplusage as Petitioners suggest (Pet. at 16 n.15). As FWS points out (Pet. at 13), "harm" is defined in ordinary usage to mean "injury." Since the ESA definition of "take" does not include "injury," this gives "harm" a meaning that is independent of, but closely aligned with, the other "take" concepts (actions directed at wildlife). While the *de facto* definition of "harm" effected by the court's decision thus does not make "harm" surplusage, the converse is not true; Judge Sentelle seems to be right in observing that the "harm" regulation makes all the other "take" terms surplusage. *See* Pet. App. 25a and 71a-72a.

for the ESA.[12] Second, the explanations of both the Senate and House floor managers attest to the intended dichotomy between habitat modifications and takings, with the latter to be prohibited under ESA § 9 while the "distinct problem" of habitat modifications that might indirectly injure listed species would be addressed through acquisition of non-federal lands under ESA § 5 (and constraints on federal agencies under ESA § 7). *See* 119 Cong. Rec. 25669 (July 24, 1973) (remarks of Sen. Tunney); 119 Cong. Rec. 30162 (Sep. 18, 1973) (remarks of Rep. Sullivan).[13] A 1974 law review article

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[12] *See* Pet. App. 7a-8a and pages 4-5, *supra*. This point, conceded years ago by a leading environmental advocate (*see* Pet. App. 93a), is apparently conceded by Petitioners as well. Additionally, FWS's interpretation largely renders meaningless the rulemaking process with public involvement and assessment of "economic impact" that ESA § 4 requires to designate critical habitat. *See* 16 U.S.C. § 1533(a)(3) and (b)(2). FWS's view of "harm" allows the agency to avoid the rulemaking requirement entirely and to protect any habitat, not just designated critical habitat.

[13] FWS does not rebut these express legislative distinctions, but apparently believes they must yield to a Committee Report statement that "take . . . include[s] every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." Pet. at 15-16. Yet this seems an unhelpful circular statement that "take" means "take," as Judge Sentelle observed below. Pet. App. 71a.

FWS excuses as irrelevant the Senate Committee's earlier deletion of "habitat modification" from the ESA's definition of "take," arguing that the deleted language would have made *any* habitat modification a "take." Pet. at 15 n.14. But Congress could not have intended to make all habitat-disturbing actions illegal (*e.g.*, all agriculture). Instead, § 7 of S. 1983 allowed penalties specifically against a "person who . . . takes . . . any [listed] species." Therefore, the deleted language can only be fairly read as proscribing habitat modification which indirectly killed or injured specific wildlife. *Accord Endangered Species Act of 1973: Hearings on S. 1592 and S. 1983 Before the Subcommittee on Environment of the Senate Committee on Commerce*, 93 Cong., 1st Sess., 104 (1973) (environmental group testimony that the expanded "definition of

analyzed this leigslative history and came to the same conclusion the court below reached 20 years later:

> Congress meant to apply taking restrictions to stop killing or otherwise harming the animal directly but reserved the acquisition power . . . as the sole remedy for protecting habitats. . . . Based on this legislative history it is clear that "taking" should not apply to commercial cutting of timber on private lands.

R. Lachenmeier, *The Endangered Species Act of 1973: Preservation or Pandemonium*?, 5 Envtl. L. 29, 39-41 (1974); *see* Pet. App. 8a-9a.

Under the overbroad "harm" regulation, landowners risk criminal prosecutions or injunctions for engaging in many ordinary uses of their own lands, particularly if their lands are located in the large regions occupied by some listed wildlife. For example, FWS has threatened enforcement actions if landowners do not preserve up to 3,960 acres around each spotted owl nest site, and has sued one landowner to enjoin him from harvesting timber on a 72-acre tract that he owns because a spotted owl nest site is located 1.5 miles away on public land. *See Gidari*, 24 Envtl. L. at 426-40; note 9, *supra*. It thus seems clear enough that the court below did not engage in an "extravagant reading" (Pet. at 20) of the "harm" regulation.

'take' in Mr. Williams' bill [is] essential" because an animal "is just as dead if it is killed by . . . suburban or recreational development" as if it "were deliberately shot or uprooted"). Thus, there is no substantive difference between the language Congress deleted and the language FWS adopted in the "harm" regulation. *See* Pet. App. 10a.

Lastly, Petitioners argue that the "harm" regulation is somehow supported by the 1982 amendments to the ESA. Pet. at 16-17. Judge Williams addressed that point in detail. Pet. App. 10a-24a. Even Judge Mikva, in dissent, acknowledged that those amendments are insufficient to sustain the regulation (Pet. App. 39a), and none of the three other dissenters from the denial of rehearing *en banc* gave credence to the argument (*see* Pet. App. 97a-99a).

4. In the face of an inherently sound decision on the merits, FWS asserts a circuit conflict as the basis for this Court's review. It says that the decision below conflicts with the Ninth Circuit's decision in *Palila v. Hawaii Department of Land and Natural Resources,* 852 F.2d 1106, 1108-09 (9th Cir. 1988) (*"Palila II"*), and with other cases which have applied the "harm" regulation. Pet. at 21-23. Since only Sweet Home among the cited cases challenged the "harm" regulation as *ultra vires,* however, any alleged "conflict" is more illusory than real.

Although the *Palili II* court's opinion undeniably contains language generally approving of the "harm" regulation's "inclusion of habitat destruction that could result in extinction," *id.* at 1108, that language falls well short of supporting FWS's statement (Pet. at 21) that the "Ninth Circuit held" the regulation complied with the ESA. In truth, the court's language was mere *dictum* on an uncontested issue. Hawaii's appeal brief (which Sweet Home provided to the court below) did not argue that the regulation was beyond the scope of the statute. *See Sweet Home's Reply in Support of Motion to Expedite Issuance of the Mandate* at 2-5 and Attachment 1 (Apr. 22, 1994). Instead, it accepted the validity of the regulation and merely "argue[d] that the district court construed the definition of 'harm' in 50 C.F.R. § 17.3 too broadly." [14]

Since the Ninth Circuit language on which Petitioners rely for the "conflict" argument (Pet. at 21) was not "needful for the decision" (as no party put the legality of the regulation at issue), that language was *dicta*, and

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[14] 852 F.2d at 1107-08. The State's brief (at 2-3) expressly conceded that "harm" could validly "includ[e] habitat modification" if it would result in the extinction of the species. Since the issue of including habitat modification within the "harm" definition was conceded, the *Palila II* court did not have occasion to receive argument on, or engage in, the type of detailed analysis of the Act, its structure, and its legislative history that has transpired in this case. Its decision must be evaluated in that light.

courts, of course, are not "bound by *dicta*." *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, —— U.S. ——, 63 U.S.L.W. 4005, 4007 (U.S. Nov. 8, 1994). As a result, there is no fundamental conflict in the circuits. An "inconsistency in dicta" should not warrant review by this Court. Stern, Gressman, Shapiro, and Geller, *Supreme Court Practice* 167 (7th Ed. BNA 1993.)[15]

The *Palila II* court's *dicta* is not binding even within the Ninth Circuit. *See Ruff v. Sullivan*, 907 F.2d 915, 918-19 (9th Cir. 1990). There are indications that other Ninth Circuit panels are interpreting "take" provisions in wildlife protection laws more narrowly than the *Palila II* court did. *See, e.g., Hayashi*, 22 F.3d 859 (9th Cir. 1994) (construing "take" narrowly under the Marine Mammal Protection Act and, while expressly looking to the ESA for guidance, disregarding *Palila II*); *Pacific Northwest Generating Cooperative v. Brown*, 25 F.3d 1443, 1452 (9th Cir. 1994) (inadvertent killing of listed salmon while fishing is not an ESA "take"), *amended by*, 1994 WL 524623 (9th Cir. June 3, 1994). And indeed, there is currently pending a case in which the Ninth Circuit is asked to follow the D.C. Circuit's decision in *Sweet Home* and dismiss a claim that timber harvesting must be enjoined because the modification of foraging habitat might "harm" a spotted owl. *See Forest Conservation Council* v. *Rosboro Lumber Co.*, No. 94-35070 (9th Cir.) (oral argument scheduled for Jan. 12, 1995). If the Ninth Circuit does in fact follow *Sweet Home*, then any suggestion of a conflict would evaporate.

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[15] FWS's other cited cases (Pet. at 23), which also applied the "harm" regulation in contexts where the regulation's validity was not questioned, similarly do not create a split in the circuits. 1B *Moore's Federal Practice* ¶ 0.402[2] at I-35 (Matthew Bender 1993) ("When an issue is not argued . . ., the decision does not create a precedent to be followed in subsequent cases in which such an issue arises").

Thus, there is assuredly no conflict in the sense that two circuit courts of appeals, fully apprised of the issues, have reached different conclusions on the same question. If a conflict could be said to exist, it is at best immature, since the Ninth Circuit could follow the approach of the court in this case. If a true conflict develops, there obviously will be another occasion for this Court to address the legality of the "harm" regulation.

5. Nor does this case have the "exceptional importance" FWS attributes to it. Pet. at 23. First, FWS claims that the decision below threatens an orderly regime of voluntary compliance which is manifested "in the formulation of scores of habitat conservation plans" to protect listed species. Pet. at 23-24. But FWS's claims are wildly overblown. Although it may be true that "more than 150 habitat conservation plans [have been] *submitted*" (Pet. at 24 n.22) (emphasis added), it is also true that, of that total, only 33 permits (including only six "high complexity" permits) have actually been *granted* by FWS in the 12 years since authority for such permits was added to the ESA. *See* Appendix C to *Federal Appellees's Response in Opposition to Motion of Sweet Home to Expedite Issuance of the Mandate* (Apr. 19, 1994). The high cost and long delays in the permit process—which often requires multi-million dollar and multi-year investments—make the process impracticable for most private landowners. *See* R. Thornton, *The Search for a Conservation Planning Paradigm: Section 10 of the ESA*, 8 Nat. Res. & Env. 21, 22-23 (Summer 1993); C. Mann and M. Plummer, *The Butterfly Problem*, The Atlantic Monthly, Jan. 1992, at 69-70. Thus, any impact on the infrequently used permit process would not be significant.

The implicit suggestion of the foregoing claim, that listed species somehow cannot be protected without barring ordinary land uses as ESA takings, leads directly into FWS's second and main claim—that the "harm" regulation "is a critical tool in the effort to preserve listed

species." Pet. at 25. We do not doubt that it is an administratively convenient tool, but it is not the tool that Congress, balancing *all* the relevant and competing factors, ultimately chose. As this Court observed only recently, "[p]olicy considerations cannot override our interpretation of the text and structure of the Act"—the issue for the courts "is not whether imposing private civil liability . . . is good policy but whether [it] is covered by the statute." *Central Bank of Denver v. First Interstate Bank of Denver*, —— U.S. ——, 114 S.Ct. 1439, 1448, 1453-54 (1994).

In enacting the ESA, Congress chose *not* to protect habitat through the § 9 "take" prohibition, which applies to "any person." It fully recognized the importance of protecting habitat, but simply chose other mechanisms for accomplishing that objective. It did so through § 7, which requires federal agencies to use their authorities (over all federal lands, and all private lands where any federal agency action—*e.g.*, funding and permitting—is necessary to make use of those lands) to prohibit or condition any habitat-affecting actions that might jeopardize listed species or result in the destruction or adverse modification of their "critical habitat," as identified by rulemaking, and through § 5, which authorizes the federal acquisition of land and water resources in order to protect listed species. By choosing these mechanisms, Congress achieved its objective of providing for habitat protection without unnecessarily intruding on private property rights or imposing a disproportionate share of the cost of securing a "public good" upon individual private citizens. *See* Pet. App. 6a-9a.

Those tools are doubtless less convenient and more expensive—for FWS—than simply continuing to apply the "harm" regulation to constrain citizens from making ordinary uses of their lands. But they are the only tools Congress provided.

When FWS quotes this Court's statement in *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194 (1978) ("*TVA*"),[16] that the ESA was intended to "reverse the trend towards species extinction," we take it for granted that the Court was not authorizing excursions beyond the boundaries of that statute. *See National Wildlife Federation v. Burlington Northern RR*, 23 F.3d 1508, 1512 (9th Cir. 1994). "Statutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal." *Landgraf v. USI Film Products*, —— U.S. ——, 114 S.Ct. 1483, 1508 (1994). Under the ESA's compromise with private property rights, habitat protection on non-federal lands is to occur through § 7's funding and permitting controls, where applicable, and otherwise through land acquisition with compensation under § 5.

Thus, the "exceptional importance" of this case resolves itself into a matter of administrative convenience. The decision below *does* protect the habitat of listed species—it simply requires FWS to honor and to utilize the mechanisms provided by Congress in order to achieve that objective.

6. Finally, this case presents a quite separate difficulty which militates against a grant of certiorari. That is the

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[16] Pet. at 26. On the chance that FWS might be suggesting that the decision below is somehow inconsistent with *TVA*, we note that the "harm" regulation was not at issue in *TVA*. 437 U.S. at 172. The lower courts had found violations of ESA § 7, not ESA § 9. *See Hill v. TVA*, 419 F. Supp. 753, 755 & n.1 (E.D. Tenn. 1976), *aff'd in pert. part*, 549 F.2d 1064, 1069-70 & nn.13-14 (6th Cir. 1977). The Court observed that it was not reviewing the existence of ESA violations, but only whether injunctive relief should issue and whether an implied repeal had occurred. *See* 437 U.S. at 156, 171-72. In commenting on the reach of the "harm" regulation in a footnote, the Court was assuming its validity; it was careful to make plain that no one in that case was arguing or "suggest[ing] that the Secretary exceeded his authority . . . in issuing the regulations." *Id.* at 172, 184-85 n.30.

issue identified by Judge Silberman (joined by Chief Judge Mikva and Judge Wald) in the dissent from the denial of rehearing *en banc*. Judge Silberman was unsure that the premise of *Chevron* deference was warranted. He pointed out that where, as here, a statute contemplates criminal enforcement, the agency's discretion to resolve statutory ambiguities may well be more constrained than is normally presumed under the *Chevron* standard. Pet. App. 97a. Indeed, the same rule of lenity that ordinarily applies to constrain prosecutors and the courts from giving broad readings to criminal statutes ought similarly to limit an agency's discretion to give a broadening interpretation to a statutory provision.[17]

Since the panel decision found there was a discernible legislative intent, it did not have to address the implications of Judge Silberman's analysis regarding *Chevron* deference. Pet. App. 95a. But if the panel was wrong in that determination, it would assuredly be necessary to consider the issues raised by the agency's broadening interpretation of a criminal provision.

Unlike any of the other issues presented by the case or raised by FWS, the issue of the application of *Chevron* to criminal statutes does have some broad jurisprudential sig-

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[17] Under the ESA, "harm" can be prosecuted criminally with no heightened standard. *See* note 3, *supra*. Accordingly, the rule of lenity should apply (even in civil contexts) and it requires courts to "resolve the ambiguity in [the defendant's] favor" by applying the narrower interpretation. *United States v. Thomson/Center Arms Co.*, —— U.S. ——, 112 S.Ct. 2102, 2109-10 (1992) (plurality opinion of Justices Souter, Rehnquist and O'Connor); *Crandon v. United States*, 494 U.S. 152, 177-78 (1990) (concurring opinion of Justices Scalia, O'Connor and Kennedy that the rule of lenity prevails over *Chevron* deference to the agency). Therefore, even if FWS were correct that the ESA meaning of "harm" is ambiguous, the rule of lenity should still compel the narrower meaning, which would not criminalize ordinary land use activities. *See also United States v. X-Citement Video, Inc.*, —— U.S. ——, 63 U.S.L.W. 4019 (U.S. Nov. 29, 1994).

nificance. It might be an issue appropriate for this Court to consider in a proper case; but this is not the proper case. The issue was not addressed below, and apparently has not been as yet the subject of extensive judicial discussion elsewhere. In these circumstances, the Court's involvement in this issue would seem premature. If certiorari were to be granted, however, there is little question that this issue would have to be reached, because it is unlikely —in light of Judge Silberman's opinion—that the validity of FWS's interpretation could be addressed without at least considering the "criminal" issue.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 94-859

In the Supreme Court of the United States

OCTOBER TERM, 1994

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondents' challenge to the Fish and Wildlife Service's "harm" regulation under the Endangered Species Act is premised on two incorrect assertions. First, respondents erroneously maintain (Br. in Opp. 8, 10) that the "take" prohibition (which includes the prohibition against "harming" a listed species) in Section 9(a)(1) of the Act is limited to actions "directed against wildlife," and that it does not prohibit "ordinary" land use even when that use causes death or significant injury to listed species. Second, respondents contend (Br. in Opp. 8-10) that the "harm" regulation is facially invalid because it extends to actions other than those "directed against wildlife," *i.e.*, that the regulation is "overbroad in every application" inasmuch as it applies to an

"innocent" use of land that has the unintended effect of injuring listed wildlife.

1. a. With regard to respondents' construction of the "take" prohibition in Section 9(a)(1) of the Act, 16 U.S.C. 1538(a)(1), it is not altogether clear what respondents mean by "directed against wildlife" or "ordinary" land use. See Br. in Opp. 8, 10; see also *id.* at 3, 4, 5, 9, 11, 15.[1] Moreover, respondents' interpretation appears to differ from the court of appeals' interpretation of the Act's "take" prohibition as applying only to a "direct application of force." Pet. App. 4a, 5a.

What is clear, however, is that both those statutory interpretations are incorrect. Section 9 of the Act forbids any person from "taking" an endangered species, regardless of whether the taking is the primary purpose of the person's actions. The taking of a listed species through an unintentional killing or wounding violates the Act. The court of appeals recognized that "[t]he trapping of a nonendangered animal, for example, may incidentally trap an endangered species," and poses the problem of an incidental take (Pet. App. 11a)—a take that *is* prohibited by the Act, but that may not give rise to civil or criminal penalties if the actor obtained an

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[1] Respondents' adoption of the "directed against" terminology, combined with their emphasis on the actor's purpose, suggests an implausible standard that requires proof in civil (as well as criminal) cases of an actor's subjective purpose and intent actually to kill or significantly injure an endangered species. The statutory language defining "take" does not address the actor's state of mind. Respondents confuse the act itself with the *mens rea* required for criminal liability. The court of appeals recognized that imposition of criminal penalties under the "take" prohibition requires a scienter element that is specified by the Act. Pet. App. 6a, citing 16 U.S.C. 1540(b) ("knowingly violate"). Respondents, however, ignore that element in the criminal penalties provision of the Act and instead erroneously contend that the scienter issue should be addressed by restricting the scope of activities that constitute a "take" in the first place.

Respondents' repeated references to "ordinary" land use are without any concrete content and are not rooted in the text or purposes of the Endangered Species Act or the administrative and judicial interpretations of the Act.

incidental take permit that covered his trapping activity.[2] If, as respondents suggest, the Act bans only purposeful takes, there would have been no need for Congress to amend the Act in 1982 to provide for a permit allowing incidental takes. See Pet. 16-17.

b. Respondents also err in asserting that the regulation is "overbroad in every application," and therefore facially invalid, because it applies to unintended "takes." The "harm" regulation is not applicable only to actions that result in the unintended death or significant injury of a listed species. It is aimed at activities that are intended to kill or injure wildlife as well. In fact, respondents in essence concede that habitat modifications for the purpose of eliminating listed wildlife from a site do constitute unlawful "takes," although they discount such violations as "theoretical." Br. in Opp. 9.

Despite respondents' attempt to dismiss the argument about the facial nature of their challenge as an argument "lead[ing] nowhere," they concede, as they must, that such a challenge raises "conceptual difficulties." Br. in Opp. 8. Indeed, this Court has emphasized the heavy burden parties must meet to succeed in a facial challenge. See *Rust* v. *Sullivan*, 500 U.S. 173, 183 (1991), quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987).

2. Respondents selectively emphasize portions of the 1973 legislative history in an effort to support their argument that Congress intended a narrow interpretation of "take" to exclude any injury or death to species resulting from significant habitat modification or degradation. Respondents ignore, however, those portions that undercut their argument. For example, in quoting a Senate report, respondents omit (Br. in Opp. 14 n.13) the following emphasized language:

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[2] An incidental take permit may be issued where a "taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. 1539(a)(1)(B).

"'Take' is defined * * * *in the broadest possible manner* to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." S. Rep. No. 307, 93d Cong., 1st Sess. 7 (1973) (emphasis added). Respondents also ignore the House report's explanation that "take" includes the activities of birdwatchers where "the *effect* of those activities might disturb the birds and make it difficult for them to hatch or raise their young." H.R. Rep. No. 412, 93d Cong., 1st Sess. 11 (1973) (emphasis added). The latter passage demonstrates that Congress's concern was with the impact of activities on species, not with the intentions of the actor.[3] It also demonstrates that Congress intended to encompass actions that adversely affect behavioral patterns, not just those that cause bodily pain.

Respondents do not address the 1982 amendments to the Endangered Species Act other than to refer (Br. in Opp. 15 n.13) to Judge Williams's discussion (Pet. App. 10a-24a) and to Judge Mikva's statement (*id.* at 39a) that the amendments alone do not define the contours of the "take" definition. As we show in the petition (Pet. 16-17), however, the enactment in 1982 of a process for obtaining an exemption for incidental takes evidences the reasonableness of the Secretary's interpretation, because the exemption provision was established in response to circumstances involving (and despite comments criticizing) the "harm" regulation's application to habitat modification activities.

3. Respondents contend (Br. in Opp. 16-17) that no conflict among the circuits exists because the Ninth Circuit's conclusion in *Palila* v. *Hawaii Dep't of Land & Natural Resources* (*Palila II*), 852 F.2d 1106, 1108-1109 (9th Cir. 1988),

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[3] Since it almost always could be claimed that the intended purpose of an activity included something other than the foreseeable death of, or significant injury to, an endangered species, respondents' interpretation would eviscerate the "take" prohibition by making it virtually unenforceable.

that the "harm" regulation's inclusion of habitat destruction follows the plain language of the statute and conforms to congressional intent is dictum. Specifically, respondents contend that the conclusion is dictum because the state defendant in *Palila II* did not argue that the "harm" regulation's application to habitat modification activities was altogether invalid. The State of Hawaii did, however, unsuccessfully argue in *Palila II* that "harm" could not include habitat modification that could result in extinction of the species by future interference with essential behavioral patterns. Respondents' attempt to distinguish actions that "indirectly" cause harm from those that "directly" do so echoes the argument that was rejected in *Palila II*.[4] In short, both appellate decisions cannot be correct: The decision below holds that no application of the regulation to habitat modification activities is valid, whereas *Palila II* holds that the regulation is valid as applied to an action that would cause the extinction of an endangered species by destroying its habitat.[5]

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[4] If the Secretary's interpretation of "harm" in the case of the indirect effects on an endangered species resulting from destruction of its food source comports with congressional intent, as the Ninth Circuit held in *Palila II*, then that holding dictates the validity of the "harm" regulation in instances in which the habitat modification more directly and immediately causes death or injury, such as the alteration of a water body that provides the sole habitat for an entire species. See *TVA* v. *Hill*, 437 U.S. 153, 184 n.30 (1978).

[5] The existence of a circuit conflict is confirmed by a recent district court decision in the Ninth Circuit that discusses the two cases. *Seattle Audubon Soc'y* v. *Espy*, Civ. No. 92-479WD (W.D. Wash. Dec. 21, 1994). We discussed that case in the certiorari petition (Pet. 24-25) in connection with our explanation of how the decision below threatens to cause significant disruptions to federal actions. As an example, we pointed to the then-still pending case, in which environmental groups challenged the President's proposed plan to permit the lifting of the injunctions banning timber harvests on federal lands within the range of the northern spotted owl throughout the Pacific Northwest. See *ibid.* The plaintiffs in the *Seattle Audubon* case alleged that the underlying environmental documents were inadequate because they assumed that private landowners' activities that "harm" protected species may be circumscribed, but, according to the

Respondents fare no better in their attempt to explain away the reasoning in *Palila II* by reference to subsequent Ninth Circuit decisions. *United States* v. *Hayashi*, 22 F.3d 859 (9th Cir. 1993), addressed whether particular conduct violated a regulation that defines actions that constitute an unlawful "take" under the Marine Mammal Protection Act of 1972, 16 U.S.C. 1361 *et seq.* (MMPA).[6] Respondents' suggestion (Br. in Opp. 17) that *Hayashi* somehow marks a retreat from *Palila II* is contradicted by the Ninth Circuit's statement that the "harm" regulation, issued under the Endangered Species Act, "is not the controlling regulatory definition and is an improper starting point for any MMPA prosecution." 22 F.3d at 864; see also *id.* at 862. Specifically, the issue in *Hayashi* was whether a fisherman's firing of a rifle in order to scare porpoises away from his fishing lines constituted a criminal "take" by "harassment" under the MMPA regulations. *Id.* at 861. In holding that it did not, the court reasoned that the fisherman's action did not disrupt normal behavioral patterns because feeding from a fishing line is not part of porpoises' normal eating habits. *Id.* at 864-865. The court also regarded the disruption to be of sufficiently short duration

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plaintiffs, that assumption was inconsistent with the decision of the D.C. Circuit in the instant case. In its December 21, 1994, ruling, the district court upheld the government's plan. The district court noted that the D.C. Circuit's ruling in the instant case is not binding in the Ninth Circuit and that a contrary conclusion had already been reached by the Ninth Circuit in *Palila II*, which held that the "harm" regulation is valid. The district court reasoned that *Palila II* is the law of the Ninth Circuit unless changed by the Ninth Circuit itself or by this Court. See slip op. 34-37.

6 That regulation, 50 C.F.R. 216.3, is different from the one at issue here. Section 216.3 defines "take" under the MMPA as including:

> The collection of dead animals, or parts thereof; the restraint or detention of a marine mammal, no matter how temporary; tagging a marine mammal; the negligent or intentional operation of an aircraft or vessel, or the doing of any other negligent or intentional act which results in disturbing or molesting a marine mammal; and feeding or attempting to feed a marine mammal in the wild.

and consistent with the regulatory feeding prohibition, so that it did not have a significant impact on the species. *Ibid.*

Respondents mischaracterize *Pacific Northwest Generating Cooperative* v. *Brown*, 25 F.3d 1443, 1452, amended and superseded by 38 F.3d 1058 (9th Cir. 1994), by asserting (Br. in Opp. 17) that it held that an inadvertent killing of listed salmon while fishing is not a "take" under the Endangered Species Act. The issue in that case was not whether a "take" occurred; rather, it was whether the undisputed "take" of listed species properly could be authorized by a Section 7 "incidental" take statement issued in conjunction with an approval of the harvest of nonlisted species. See 16 U.S.C. 1536(b)(4)(B). In other words, the question was whether the "take" of the listed salmon was in fact "incidental" as opposed to the intended purpose of the federally authorized action.[7] The Ninth Circuit held that the federal agencies properly treated the "take" of listed species, which was an inevitable byproduct of the harvest of nonlisted species, as an "incidental" take that was eligible for exemption from the Section 9 prohibition pursuant to an incidental take statement issued under Section 7 of the Act. Thus, *Pacific Northwest Generating Cooperative* in no way undermines the holding in *Palila II*.[8]

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[7] The plaintiffs in *Pacific Northwest Generating Cooperative* were power companies that sought a total ban on all commercial fish harvests in the belief that such a ban would lessen the restrictions that had been imposed on power generation in order to protect listed species. To that end, the plaintiffs argued that the National Marine Fisheries Service in the Department of Commerce violated the Endangered Species Act by issuing a Section 7 incidental take statement for the taking of listed salmon in conjunction with the harvest of nonlisted salmon. The plaintiffs reasoned that because the purpose of the authorized action was to catch fish, the "take" of listed species was not "incidental" within the meaning of Section 7(b)(4)(B), 16 U.S.C. 1536(b)(4)(B), and, therefore, that the federal approval of the fish harvest should be enjoined.

[8] Contrary to respondents' suggestion (Br. in Opp. 17), there is no reason to believe that the Ninth Circuit will revisit the "harm" regulation's validity in a pending case, *Forest Conservation Council* v. *Rosboro Lumber*

The circuit conflict created by the decision below should be resolved by this Court. Because the D.C. Circuit can exercise jurisdiction in a manner that overlaps with the geographic jurisdiction of other courts of appeals, the conflict presented here is immediately and unusually disruptive. See Pet. 22-23. In addition, that jurisdictional arrangement may frustrate further development of the issue in other courts of appeals.

4. Finally, respondents suggest (Br. in Opp. 18) that the Court should not grant review because invalidation of the "harm" regulation would not have any significant impact on endangered species or on the Section 10 permit program because, they assert, expense and delay have resulted in infrequent invocation of the permit process. Contrary to respondents' assertion, however, the submission of 150 applications for Section 10 permits (see Pet. 24 & n.22) evidences substantial voluntary participation, particularly since most of the applications have been submitted in recent years. Moreover, as we show in the petition (Pet. 24), voluntary compliance is also accomplished by special rules or by project modifications developed in consultation with the Fish and Wildlife Service to avoid altogether any incidental "take" of a listed species.

Co., No. 94-35070. The principal issue in that case is whether the citizen suit provision, 16 U.S.C. 1540(g)(1)(A), authorizes a district court to enjoin completion of a project that would, if completed, "take" a listed species. The district court held that it did not have such authority, and that the suit had been prematurely filed. A secondary issue relates to the type of evidence required to establish a "take." On appeal, the defendants-appellees have challenged the validity of the "harm" regulation and argued that the Ninth Circuit should follow the D.C. Circuit's decision below. See Defendants-Appellees' Br. 4-18. The plaintiffs-appellants have responded by arguing that the issue may not be raised for the first time on appeal and that neither the plaintiffs-appellants nor the Ninth Circuit is bound by the D.C. Circuit's decision. See Plaintiffs-Appellants' Reply Br. 1-6. The defendants-appellees did not request an en banc hearing, as would be required to overturn a prior Ninth Circuit panel holding. In this procedural posture, the Ninth Circuit should have no occasion to address the validity of the "harm" regulation.

Abandonment of the "harm" regulation would mark a fundamental change in the approach to species protection that has governed during the entire 20-year period that the Endangered Species Act has been in effect—an approach that was affirmed and implemented by Congress in the 1982 amendments. Respondents do not deny that preservation of habitat is essential to the survival of most endangered species. Respondents therefore are wrong in suggesting that there is nothing remarkable or consequential in the court of appeals' invalidation of the Secretary's longstanding interpretation of the Act.

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

DECEMBER 1994

(5)

No. 94-859

Supreme Court, U.S.
FILED
FEB 21 1995
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.,
PETITIONERS

v.

SWEET HOME CHAPTER OF COMMUNITIES
FOR A GREAT OREGON, ET AL.

ON WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA CIRCUIT COURT OF APPEALS

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED:
NOVEMBER 10, 1994
CERTIORARI GRANTED: JANUARY 6, 1995

BEST AVAILABLE COPY

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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 91-1468

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, ET AL., PLAINTIFFS

v.

MANUAL LUJAN, JR., Secretary of the Interior, JOHN F. TURNER, Director, U.S. Fish and Wildlife Service, DEFENDANTS

DOCKET ENTRIES

DATE	Nr.	PROCEEDINGS
1991		
6/14	1	COMPLAINT filed summons (4) issued (adc) [Entry date 06/25/91]
6/14	2	RULE 109 Certificate of disclosure of corporate affiliations and financial interests by plaintiff ERICKSON BUSHELING, plaintiff SOUTHEASTERN LUMBER, plaintiff RIDGETREE LOGGING, plaintiff SHOTPOUCH LOGGING (adc) [Entry date 06/25/91]
6/24	3	AFFIDAVIT OF SERVICE of summons and complaint upon the U.S. Attorney General served personally on 6/17/91 (accepted by Elgie Labbe, Sr., Clerk) (mbh) [Entry date 06/28/91]
6/24	4	AFFIDAVIT OF SERVICE of summons and complaint upon defendant JOHN F. TURNER served personally on 6/17/91 (Accepted by Carol Kesterson, Cheif, Docket & Records Control) (mbh) [Entry dated 06/28/91]

DATE	Nr.	PROCEEDINGS
1991		
6/24	5	AFFIDAVIT OF SERVICE of summons and complaint upon defendant MANUEL LUJAN JR. served personally on 6/17/91 (accepted by Jackie Ashton, Secretary) (mbh) [Entry date 06/28/91]
6/24	6	AFFIDAVIT OF SERVICE of summons and complaint upon U.S. Attorney for DC on 6/17/91 (Accepted by Secretary) (mbh) [Entry date 06/28/91]
8/16	7	ANSWER for defendant JOHN F. TURNER, defendant MANUEL LUJAN, JR. (mbh)
8/16	—	CALENDARED (mbh)
8/29	8	MOTION by plaintiffs for summary judgment; Exhibits (9) (mbh) [Entry date 08/30/91]
9/3	9	JOINT MOTION by plaintiffs, defendants to extend time for federal defendants to file an opposition to plaintiffs' motion for summary judgment to 10/9/91, plaintiffs to file their joint opposition to cross motion for summary judgment and reply in support of motion for summary judgment to 11/1/91 and federal defendants to reply to cross motion for summary judgment to 11/15/91 (mbh) [Entry date 09/05/91]
9/6	10	ORDER by Judge Norma H. Johnson: granting joint motion to extend time for federal defendants to file an opposition to plaintiffs' motion for summary judgment to 10/9/91, plaintiffs to file their joint opposition to cross motion for summary judgment and reply in support of motion for summary judgment to 11/1/91 and federal defendants to reply to cross motion for summary judgment to 11/15/91 [9-1] by MANUEL LUJAN JR., PAT MCCOLLUM (N) (mbh) [Entry date 09/10/91]

DATE	Nr.	PROCEEDINGS
1991		
9/19	11	MOTION by Movants HEADWATERS, NATIONAL AUDUBON SOC, OREGON NATURAL RES, PILCHUCK AUDUBON SOC, PORTLAND AUDUBON SOC, SEATTLE AUDUBON SOC, SIERRA CLUB, WILDERNESS SOCIETY for leave to intervene (1pp) [Entry date 09/20/91]
10/2	12	RESPONSE by defendant JOHN F. TURNER, defendant MANUEL LUJAN JR. motion for leave to intervene [11-1] by intervenor (mbh) [Entry date 10/04/91]
10/9	13	MOTION by defendant JOHN F. TURNER, defendant MANUEL LUJAN JR. for summary judgment (mbh) [Entry date 10/10/91]
10/9	14	MOTION by intervenors for leave to file brief amicus curiae in support of defendants' opposition to plaintiffs' motion for summary judgment; EXHIBITS: BRIEF AND DECLARATION (1) (mbh) [Entry date 10/10/91] [Edit date 10/10/91]
10/9	15	MOTION by defendant JOHN F. TURNER, defendant MANUEL LUJAN JR. to dismiss; Exhibits (2) (mbh) [Entry date 10/10/91]
10/15	16	MOTION by defendant MANUEL LUJAN JR., and plaintiff SWEET HOME CHAPTER to extend time and modification of the briefing schedule established by the court's, dated 9/6/91 (dot) [Entry date 10/17/91]
10/16	17	ORDER by Judge Norma H. Johnson: granting motion to extend time and modification of the briefing schedule established by the court's, dated 9/6/91 [16-1] by SWEET HOME CHAPTER, MANUEL LUJAN JR. brief due 11/1/91; response to brief due 11/15/91; reply to brief due 11/22/91; (N) (mbh) [Entry date 10/22/91]

DATE	Nr.	PROCEEDINGS
1991		
10/22	18	NOTICE OF FILING of originally signed declaration of Julie Norman in support of motion to interven by intervenor HEADWATERS (mbh) [Entry date 10/23/91]
10/23	19	MOTION by intervenors HEADWATERS, NATIONAL AUDUBON SOC, OREGON NATURAL RES, PILCHUCK AUDUBON SOC, PORTLAND AUDUBON SOC, SEATTLE AUDUBON SOC, SIERRA CLUB, WILDERNESS SOCIETY for leave to file reply brief in support of motion to intervene ourt of time (mbh) [Entry date 10/25/91]
10/31	20	MEMORANDUM by plaintiff in opposition to motion to dismiss [15-1] by MANUEL LUJAN JR., JOHN F. TURNER; exhibits (2) (cjp) [Entry date 11/04/91]
10/31	21	RESPONSE by plaintiffs in opposition to motion for summary judgment [13-1] by MANUEL LUJAN JR., JOHN F. TURNER and in reply on plaintiffs' motion for summary judgment (cjp) [Entry date 11/04/91]
11/15	22	REPLY by defendant JOHN F. TURNER, defendant MANUEL LUJAN JR. to response to motion to dismiss [15-1] by MANUEL LUJAN JR., JOHN F. TURNER (kmk) [Entry date 11/19/91]
11/21	23	REPLY by intervenor HEADQUARTERS to motion for summary judgment [13-1] by MANUEL LUJAN JR., JOHN F. TURNER (cjp) [Entry date 11/22/91]
11/22	24	REPLY by defendants to response to motion for summary judgment [13-1] by MANUEL LUJAN JR., JOHN F. TURNER; attachment (clv) [Entry date 11/26/91]

DATE	Nr.	PROCEEDINGS
1991		
12/5	25	MOTION by plaintiff for leave to file surreply to motion for summary judgment; EXHIBIT (surreply) (clv) [Entry date 12/06/91]
12/10	26	MEMORANDUM OPINION by Judge Norman H. Johnson (N) (clv) [Entry date 12/12/91]
12/10	27	ORDER by Judge Norma H. Johnson: denying motion for leave to intervene [11-1] by intervenor (N) (clv) [Entry date 12/12/91]
12/20	28	RESPONSE by defendant JOHN F. TURNER, defendant MANUEL LUJAN JR. in opposition to motion for leave to file surreply to motion for summary judgment [25-1] by plaintiff (cjp) [Entry date 12/24/91]
1/23	29	NOTICE OF APPEAL by plaintiff(s) from order [27-1] entered 12/10/91, Docket and filing fees paid: $105.00, copies to: Robert Dreher, Victor M. Sher, Barry M. Hartman, and John A. Macleod (1pp) [Entry date 01/24/92]
1992		
1/24	—	TRANSMITTED PRELIMINARY RECORD on appeal [29-1] by plaintiff(s) to U.S. Court of Appeals (1pp)
1/24	30	NOTICE OF APPEAL (AMENDED) by proposed defendant intervenors HEADWATERS, NATIONAL AUDUBON SOC, OREGON NATURAL RES, PILCHUCK AUDUBON SOC, PORTLAND AUDUBON SOC, SEATTLE AUDUBON SOC, SIERRA WILDERNESS SOCIETY from order [27-1] entered 12/12/91. Fees paid 1/23/92. Copies mailed to Jean E. Williams, Esq., John A. Macleod, Esq., Steven P. Quarles, Esq., Thomas R. Lundquist, Esq., and Clair S. Brier, Esq. (mbd) [Entry date 01/27/92]

DATE	Nr.	PROCEEDINGS
1992		
1/27		— TRANSMITTED PRELIMINARY RECORD on appeal [30-1] by intervenor to U.S. Court of Appeals (mbd)
1/27		— USCA # 92-5024 assigned for appeals [29-1] by plaintiff(s) (clv) [Entry date 01/29/92]
1/29		— USCA # 92-5024 assigned for appeal [29-1] by plaintiff(s) (cjp) [Entry date 01/31/92]
5/29	31	MEMORANDUM AND ORDER by Judge Norma H. Johnson: denying motion to dismiss [15-1] by MANUEL LUJAN JR., JOHN F. TURNER (N) (jeb)
5/29	32	MEMORANDUM OPINION by Judge Norma H. Johnson (N) (jeb)
5/29	33	ORDER & JUDGMENT granting the motion of defendants for summary judgment; denying the plaintiffs' motion for summary judgment; entering judgment in favor of defendant JOHN F. TURNER, defendant MANUEL LUJAN JR. against plaintiff(s) PAT MCCOLLUM, plaintiff(s) EMMY G. BIRKENFELD, plaintiff(s) JEAN plaintiff(s) SHOTPOUCH LOGGING, plaintiff(s) RIDGETREE LOGGING, plaintiff(s) SOUTHERN TIMBER, plaintiff(s) SOUTHEASTERN LUMBER, plaintiff(s) ERICKSON BUSHELING, plaintiff(s) BETTY F. OREM, plaintiff(s) MILL CITY CHAPTER, plaintiff(s) SWEET HOME CHAPTER (N) (jeb)
7/9	34	NOTICE OF APPEAL by plaintiff(s) PAT MCCOLLUM, plaintiff(s) EMMY G. BIRKENFELD, plaintiff(s) JEAN REYNOLDS, plaintiff(s) SHOTPOUCH LOGGING, plaintiff(s) RIDGETREE LOGGING, plaintiff(s) SOUTHERN TIMBER, plaintiff(s) SOUTHEASTERN LUMBER, plaintiff(s) ERICKSON BUSHELING, plain-

DATE	Nr.	PROCEEDINGS
1992		tiff(s) BETTY F. OREM, plaintiff(s) MILL CITY CHAPTER, plaintiff(s) SWEET HOME CHAPTER from order [31-1] entered on: 5/29/92. Fee paid. Copies mailed to, Jean Williams, David Gayer, Robert Dreher, Victor M. Sher (dmb) [Entry date 07/10/92]
7/10	—	TRANSMITTED PRELIMINARY RECORD on appeal [34-1] by plaintiff(s) to U.S. Court of Appeals (dmb)
7/16	—	USCA # 92-5255 assigned for appeal [34-1] by plaintiff(s) (1pp) [Entry date 07/20/92]
1994		
12/6	35	CERTIFIED COPY of Judgment filed in USCA dated 7/25/94, on appeal [34-1], affirming the judgment of USDC.; No Opinion attached. USCA # 92-5255 (mbd) [Entry date 12/08/94]
12/8	36	CERTIFIED COPY of Order filed in USCA dated 12/7/94, requesting USDC to return the mandate issued on 12/6/94. USCA # 92-5255 (mandate returned to USCA on 12/8/94) (mbd)

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 92-5255

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, ET AL., APPELLANTS

v.

BRUCE BABBITT, Secretary of the Interior, ET AL., APPELLEES

DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
Lower court information:	
Date Filed: 6/14/91	
Date order/judgment: 5/29/92	
Date NOA filed: 7/9/92	
(N) 07/14/92	Copy of notice of appeal and docket entries from Clerk, USDC (n-2)
(N) 07/14/92	Docketing fee paid in district court 07/9/92
(N) 07/14/92	Order 86-6: Initial submissions and procedural motions due 08/13/92; dispositive motions due 08/28/92. Docketing statement was mailed to appellant.
(N) 07/30/92	5-Sweet Home Chapter (92-5024) motion to consolidate appeals and schedules (m-30) [8].
(N) 07/30/92	2-Appellant's initial submissions (m-30) [15]. Def. Appendix—NO.

DATE	FILINGS—PROCEEDINGS
(N) 08/27/92	Per Curiam Order that the motion for voluntary dismissal of 92-5024 is granted. It is further Ordered that the motion to consolidate be dismissed as moot. It is further ordered that the motion to substitute 92-5255 for 92-5024 on the court's calendar is denied. The briefing schedule proposed by parties 92-5255 be adopted: Appellant's brief and appendix - 10/26/92; Appellee's brief 11/25/92 and Appellant's Reply brief 12/09/92. The Clerk is directed to place 92-5255 on the court's stand-by pool for the scheduling of oral argument. The Clerk is further directed to issue forthwith to respondent a certified copy of this order in lieu of formal mandate in 92-5024 only. The Clerk is also directed to file a copy of this order in both cases. Before: Mikva, Chief Judge; Silberman & Henderson Circuit Judges.
(CC) 10/06/92	Clerk's order scheduling case for oral argument on 02/17/93 at 9:30 a.m. before Chief Judge Mikva and Circuit Judges Williams and Sentelle; Form 72 due by 02/10/93.
(H) 10/26/92	15-APPELLANT'S BRIEF (p-26) [4 to 23].
(H) 10/26/92	7-JOINT APPENDIX (p-26) [4 to 23].
(N) 11/25/92	15-APPELLEES BRIEF (m-25)
(N) 12/09/92	15-APPELLANTS REPLY BRIEF (p-9).
(CC) 02/03/93	Per Curiam order allotting the following times for oral argument: Appellants - 20 minutes; Appellees - 20 minutes; The panel consists of Chief Judge Mikva and Circuit Judges Williams and Sentelle; Form 72 due by 02/10/93.
(WT) 2/17/93	ARGUED BEFORE: Chief Judge Mikva and Circuit Judges Williams and Sentelle.

DATE	FILINGS—PROCEEDINGS
(cb) 7-23-93)	Opinion for the Court filed by Chief Judge Mikva. Chief Judge Mikva and Circuit Judge Williams, concurring. Circuit Judge Sentelle, dissenting.
(cb) 7-32-93	Judgment for the Court that the judgment of the district court is hereby affirmed in accordance with the opinion for the Court filed herein this date.
(cb) 7-23-93	Order delaying mandate.
(N) 08/03/93	5-Appellee's bill of costs (m-3) [9].
(N) 08/31/93	20-Appellants' petition for rehearing & suggestion for rehearing en banc (m-31) [1].
(N) 11/04/93	Per Curiam Order that appellee file a response to the petition for rehearing & suggestion for rehearing en banc on or before 11/18/93.
(N) 11/18/93	20-Appellees' response to petition for rehearing & suggestion for rehearing en banc (m-18) [1].
(N) 01/05/94	20-Appellants' 28(j) Letter (m-5) [1].
(cb) 3-11-94	Per Curiam Order for the Court that the petition for rehearing is granted, as set forth in the opinion of the court filed herein this date.
(cb) 3-11-94	Per Curiam Order for the Court that the suggestion for rehearing *In Banc* is hereby denied.
(cb) 3-11-94	Opinion for the Court filed by Circuit Judge Williams. Circuit Judge Sentelle concurring; and Chief Judge Mikva, dissenting.
(N) 03/16/94	5-Appellees' motion to stay the mandate (m-16) [1].
(N) 03/18/94	5-Appellees' amended motion to stay the mandate (m-18) [1].

DATE	FILINGS—PROCEEDINGS
(N) 03/24/94	Per Curiam Order that the motion to stay mandate is granted. The Clerk shall withhold issuance of the court's mandate through 4/25/94 and, should a petition for hearing be filed on or before that date, until 7 days after disposition thereof. Before: Mikva, Chief Judge; Williams and Sentelle, Circuit Judges.
(D) 04/12/94	5-Appellants' motion to expedite issuance of the mandate. (p-12) [1]
(N) 04/19/94	5-Appellees' response to motion to expedite issuance of the mandate (m-19) [1].
(N) 04/22/94	5-Appellants' reply to motion to expedite issuance of the mandate (p-22) [1].
(N) 04/25/94	20-Appellees' petition for rehearing and suggestion for rehearing in banc (m-25) [1].
(N) 05/02/94	Per Curiam Order that the motion to expedite mandate is denied. Before: Mikva, Chief Judge; Williams and Sentelle, Circuit Judges.
(N) 05/02/94	Per Curiam Order that the appellants respond thereto and do so on or before 5/17/94.
(N) 05/06/94	20-Appellees' letter informing the court of amendment to legislation (m-5) [1].
(N) 05/17/94	20-Appellants' in opposition to petition for rehearing (p-17) [1].
(N) 05/27/94	5-Appellees motion for leave to file a reply to opposition for petition for rehearing in banc (m-27) [1].
(N) 05/27/94	20-Appellees reply to opposition to petition for rehearing in banc (m-27) [1]. Lodged
(E) 06/06/94	5-Appellant (Sweet Home's Opposition to Government's Motion for Leave to File an Extraordinary Reply on a Hearing Petition (m-06) [1]

DATE	FILINGS—PROCEEDINGS
(E) 06/30/94	20-Supplemental to Motion for Petition for Rehearing *In Banc* (m-30) [1] (LODGED)
(E) 07/21/94	Per Curiam order of the letter, with attachment, dated June 30, 1994, from appellees, it is ORDERED, by the Court, that the Clerk is directed to file the aforesaid letter. (Mikva, Chief Judge; Wald, Edwards, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph and Rogers, Circuit Judges)
(E) 07/21/94	Supplemental to Motion for Petition for Rehearing *In Banc* (FILED PER ORDER OF JULY 21, 1994)
(E) 07/27/94	Per Curiam order of Appellees' Motion for Leave to File Reply to Memorandum of Appellants in Opposition to Petition for Rehearing with Suggestion for Rehearing *In Banc* and of the response thereto, it is ORDERED, by the Court *in banc*, that the motion is granted and the Clerk is directed to file the lodged reply. (Mikva, Chief Judge; Wald, Edwards, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph and Rogers, Circuit Judges)
(E) 07/27/94	Reply to Memorandum of Appellants in Opposition to Petition for Rehearing with Suggestion for Rehearing *In Banc*. (FILED PER ORDER OF 7/27/94)
(cb) 8-12-94	Per Curiam Order for the Court that appellee's petition for rehearing is hereby denied. Mikva, Chief Judge, Williams and Sentelle, CJs. Chief Judge Mikva would grant the petition. Statement by Williams, joined by Sentelle.

DATE	FILINGS—PROCEEDINGS
(cb) 8-12-94	Per Curiam In Banc order denying suggestion for rehearing in banc. Chief Judge Mikva, Wald, Silberman and Rogers would grant the suggestion. Statement by Silberman joined by Chief Judge Mikva.
(cb) 8-12-94	Foregoing orders and statements released as slip opinion.
(E) 08/19/94	5-Federal Appellees' Motion to Stay the Mandate Pending Application to the Supreme Court for a Writ of Certiorari. (p-19) [1]
(H) 08/22/94	5-Appellant's opposition to a further stay of the mandate (p-22) [1].
(E) 09/15/94	Per Curiam order of Federal Appellees' Motion to Stay the Mandate Pending Application to the Supreme Court for a Writ of Certiorari and of the opposition thereto, it is ORDERED, by the Court, that the motion is granted. The Clerk is directed to withhold issuance of the mandate through September 19, 1994. (Williams and Sentelle, Circuit Judges)
(E) 09/16/94	5-Federal Appellees Motion for Extension of Stay of Mandate Pending Application for Writ of Certiorari to the Supreme Court. (p-16) [1]
(E) 09/20/94	5-Sweet Homes Opposition to the Government's September 16 Motion for a Further Stay of the Mandate. (p-20) [1]
(E) 10/14/94	Per Curiam order of Appellees Motion to Stay the Mandate, and of the Opposition thereto, it is ORDERED that the motion is granted. The Clerk is directed to withhold issuance of the court's mandate through November 10, 1994. (Williams and Sentelle, Circuit Judges)
(E) 10/14/94	SEE AUTOMATED DOCKET FOR FURTHER ENTRIES.

DATE	FILINGS—PROCEEDINGS
7/14/92	CIVIL-US CASE docketed. Notice of Appeal filed by Appellant Sweet Home Chptr, Appellant Mill City Chptr, Appellant Betty F. Orem, Appellant Erickson Busheling, Appellant SE Lumber Mftr Assoc, Appellant So Timber Purchases, Appellant Ridgetree Logging Co, Appellant Shotpouch Logging Co, Appellant Jean Reynolds, Appellant Emmy G. Birkenfeld, Appellant Pat McCollum. [78231-1] (lvs)
9/16/94	MOTION filed (5 copies) by Appellee Bruce Babbitt, Appellee John F. Turner (certificate of service dated 9/16/94) for Extension of Stay of Mandate Pending Application for Writ of Certiorari to the Supreme Court. Response due on 9/26/94. (lvs)
9/20/94	OPPOSITION filed [78240-1] (5 copies) by Appellant Sweet Home Chptr, et al., (Certificate of service dated 9/20/94) to the motion for stay of mandate [78234-1]. (lvs)
10/14/94	IMPORTANT NOTICE ABOUT DOCKET ENTRIES: Prior to this date, the above automated docket entries may not be complete. Please see the paper docket which in located in Clerk's Office. (lvs)
10/14/94	PER CURIAM ORDER filed granting motion withholding mandate filed by Bruce Babbitt, John F. Turner [78234-1] until 11/10/94. Before Judges Williams, Sentelle, (No 3rd Judge) (lvs)
11/16/94	NOTICE Filed by Clerk, Supreme Court of the filing of a petition for writ of certiorari on 11/10/94. Supreme Court docket No. 94-859. [92527-1] (jth)
12/5/94	MANDATE ISSUED to Clerk, District Court [88112-1]. (jas)

DATE	FILINGS—PROCEEDINGS
12/6/94	PER CURIAM ORDER filed granting appellees' bill of costs & costs be awarded to appellees in the amount of $127.65 and taxed against appellants. Costs are payable directly between the parties and should not be submitted to the Clerk [88599-1]. Before Judges Mikva, Williams, Sentelle. (su)
12/7/94	CLERK'S ORDER filed recalling the mandate; The Clerk of the District Court is requested to return the mandate as promptly as the business of her office permits. (su)
12/7/94	MANDATE RETURNED from DC. (su)
12/8/94	CLERK'S ORDER filed amending Per Curiam order filed 12/6/94 by deleting "Mikva, Chief Judge" from the order [88599-1]. (su)
12/12/94	CLERK'S ORDER filed vacating Per Curiam order of 12/6/94 regarding costs; FURTHER ORDERED, sua sponte, that the bill of costs filed on 8/3/93 be dismissed. [88599-1]. (su)
12/12/94	NOTIFICATION from Appellee of filing of petition for certiorari on 11/10/94 [92526-1]. (jth)
1/12/95	NOTICE RECEIVED FROM CLERK, SUPREME COURT: Certified copy of order entered on 01/06/95, granting the petition for writ of certiorari to the USCA, DC. Supreme Court Docket No. 94-859. [95501-1] (jth)

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 91-1468

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, ET AL., PLAINTIFFS

v.

MANUAL LUJAN, JR., Secretary of the Interior, JOHN F. TURNER, Director, U.S. Fish and Wildlife Service, DEFENDANTS

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION

1. This is an action for declaratory and injunctive relief challenging two U.S. Department of the Interior regulations which are in excess of the regulatory authority conferred by the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-44 (1988). The two challenged regulations are 50 C.F.R. § 17.3 (definition of "harm") and 50 C.F.R. § 17.31(a).

The ESA makes it unlawful to "take" an endangered species, 16 U.S.C. § 1538(a)(1)(B), and provides both civil and criminal sanctions for "taking" violations, *id.* § 1540. Both independently and collectively, the challenged regulations operate to extend the "taking" prohibition—and therefore the exposure to civil and criminal penalties—far beyond the limits intended by Congress in the ESA. By so doing, the regulations improperly and severely injure plaintiffs, denying them the use of

their lands and causing other hardships as described more fully below.

II. JURISDICTION AND VENUE

2. This Court has jurisdiction over this action under 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1361 (mandamus); 28 U.S.C. §§ 2201-02 (declaratory judgment); 16 U.S.C. § 1540(g) (ESA citizen suits); and 5 U.S.C. §§ 701-06 (judicial review of agency actions).

3. Venue in this Court is proper under 16 U.S.C. § 1540(g)(3)(A), and 28 U.S.C. § 1391(e)(1) and (2), since defendants officially reside in the District of Columbia and since the challenged regulations were signed there.

III. PARTIES

A. *Plaintiffs*

4. Plaintiff Sweet Home Chapter of Communities for a Great Oregon ("CGO Sweet Home") is a nonprofit, grass roots organization with its principal place of business in Sweet Home, Oregon. It was formed (a) to heighten the public awareness concerning the contributions of Sweet Home residents, families and businesses to the American economy, and (b) to offer support to community members who have been adversely affected by the listing of the northern spotted owl ("owl" or "spotted owl") as a threatened species under the ESA and by the regulations challenged in this lawsuit. Its members are individuals and families who live in and around Sweet Home, all of whom depend directly or indirectly on timber supply for their livelihoods and community institutions. Through the losses of jobs, reductions in revenues that support schools and other public projects in and around Sweet Home, and the increased societal burdens caused by the widespread inability to find work in their community, the members of CGO Sweet Home have been

and continue to be adversely affected by the challenged regulations. CGO Sweet Home brings this action on its own behalf and on behalf of its members.

5. Plaintiff Mill City Chapter of Communities for a Great Oregon ("CGO Mill City") is a nonprofit, grass roots organization with its principal place of business in Mill City, Oregon. It was formed (a) to educate the general public and elected officials concerning the contributions of Mill City residents, families and businesses to the American economy, and (b) to offer support to community members who have been adversely affected by the listing of the spotted owl and by the regulations challenged in this lawsuit. Its members are individuals and families who live in and around Mill City, all of whom depend directly or indirectly on timber supply for their livelihoods and community institutions. The members of CGO Mill City have suffered job losses, a deterioration of educational and other services which are substantially supported by timber revenues in their community, and increases in social welfare costs; in these and other ways, they have been and continue to be adversely affected by the challenged regulations. CGO Mill City brings this action on its own behalf and on behalf of its members.

6. Plaintiff Betty F. Orem is a resident of Port Angeles, Washington. She is the trustee for the Harold M. and Betty F. Orem Trust, the corpus of which is a 27-acre stand of timber that her father bought more than 60 years ago and which she now holds in trust for her daughter. The land abuts the Olympic National Forest and has been classified as a tree farm.

In May and June of 1989, while carrying out clear-cutting operations in the neighboring National Forest, the Forest Service burned and otherwise damaged a number of Mrs. Orem's trees. In considering her subsequent compensation claim, the Forest Service advised Mrs. Orem that she had a duty to mitigate the damage by harvesting

and selling the damaged trees for their salvage value. When she sought approval to conduct salvage operations and otherwise to maintain the value of her timber stand by routine thinning, however, Mrs. Orem's application was delayed and then substantially denied due to the presence of a spotted owl in the Olympic National Forest, about half a mile from her property. The restrictions imposed upon Mrs. Orem's use of her property, in reliance on the challenged regulations, have damaged Mrs. Orem by depriving her of needed income from the trust and by diminishing the value of the trust corpus.

7. Plaintiff Erickson Busheling, Inc. is a logging company with its principal place of busines in Port Angeles, Washington. Erickson Busheling contracted with Plaintiff Orem to remove the trees that had been damaged by the Forest Service and conduct the other thinning she wanted done. It has not been able to perform under that contract because of the problems Mrs. Orem has experienced in securing approval of her application, as described in paragraph 6, and because harvesting her timber may be illegal under the challenged regulations. Erickson Busheling's ability to obtain other logging contracts has also been adversely impacted by the presence of the spotted owl in the area and the consequent restrictions imposed in reliance on the challenged regulations. As a result, Erickson Busheling has reduced its work force from 15 to 3 employees over the last 2 years.

8. Plaintiff Emmy G. Birkenfeld is the trustee for the William F. Birkenfeld Trust, the corpus of which includes 5600 acres of land eligible for timber harvesting near Carson, Washington. The income derived from harvesting timber from these lands supports Mrs. Birkenfeld, her two sons, and her sons' families. Mrs. Birkenfeld had been able to harvest timber from the 5600 acres until recently when spotted owls were discovered nearby, and under the regulations challenged in this lawsuit Mrs. Birkenfeld risks prosecution for an ESA "taking" if she harvests her

land. Every application for approval to harvest timber submitted by Mrs. Birkenfeld has been substantially denied.

Moreover, Mrs. Birkenfeld has been denied the right to harvest three parcels, each approximately 200 acres in size, for which approval had previously been given. After harvesting had begun pursuant to those approvals, the Washington State Department of Natural Resources issued stop orders to the trust, in reliance on the challenged regulations, claiming that its operations might harm or harass a spotted owl through habitat modification and therefore result in a take. Since the operations were allegedly within 1.8 miles of a known spotted owl nest or breeding pair and would reduce available suitable habitat for the owl, the state ordered all timber falling on these parcels stopped indefinitely.

Because of the foregoing restrictions which have been placed on Mrs. Birkenfeld's use of the trust property, in reliance on the challenged regulations, Mrs. Birkenfeld is currently unable to cut timber from *any* of the 5600 acres that would otherwise be available for harvesting. The Birkenfelds have accordingly been deprived of the needed income from the trust and, as a result, have lost the financial support that the trust was designed to provide.

9. Plaintiff Ridgetree Logging is a logging company with its principal place of business in Sweet Home, Oregon. It contracts to perform logging operations for a timber company that owns a large amount of land near Sweet Home. Because the spotted owl is found throughout the Sweet Home area and because the challenged regulations are being applied to create a threat of "taking" enforcement actions under the ESA, logging operations have been drastically curtailed by Ridgetree's timber supply source. As a result of the wrongful regulations, therefore, Ridgetree has had to lay off most of its employees, cannot

make insurance, tax and equipment payments, and will most likely fail.

10. Plaintiff Shotpouch Logging Company is a "timber falling" company with its principal place of business in Sweet Home, Oregon. It contracts to cut the trees for Ridgetree Logging Company on private lands in the Sweet Home area. For the reasons described in paragraph 9, Shotpouch also has no source of timber, has had to lay off most of its employees, cannot make insurance, tax and equipment payments, and will most likely fail.

11. Plaintiff Jean Reynolds is a resident of Sweet Home, Oregon. She owns and operates R&W Logging Company, which has its principal place of business in Sweet Home, Oregon. Ms. Reynolds had been logging National Forest and Bureau of Land Management timber, but was forced to begin logging private lands when the spotted owl was listed and the federal government halted most timber sales. Because spotted owls have been found on most private lands in the area and because of the threat of "taking" enforcement actions under the ESA, as applied through the challenged regulations, she has also been foreclosed from working on private lands and is now unable to operate. She has had to lay off all of her employees, cannot make insurance, tax and equipment payments, and R&W Logging is likely to fail. In addition, Ms. Reynolds is in danger of losing her home since it is the guarantee for some of her equipment. Like most of the other plaintiffs, she has substantial equipment loans which cannot be satisfied by selling the equipment, since the cutbacks in timber harvesting throughout the Pacific Northwest are causing equipment to be sold at auction for many times less than its value.

12. Plaintiff Pat McCollum is a resident of Sweet Home, Oregon. He is co-owner of McCollum Logging Company, a small family-owned contract logging company with its principal place of business in Sweet Home. He

had contracted to perform logging for a timber company that owns a large amount of land near Sweet Home. Because the spotted owl has been found throughout the Sweet Home area, and because the unlawful regulations challenged in this action are being applied to create a threat of an ESA "taking" prosecution, Mr. McCollum has no source of timber, has had to lay off most of his employees, cannot make insurance, tax and equipment payments, and his company will most likely fail. In addition, he owns a stand of timber that he had hoped to harvest and use for support for his retirement. A spotted owl nest has been found near his property, and under the challenged regulations he would not be able to harvest his own timber because of the same threat of prosecution under the ESA. His current livelihood and provisions for retirement are thus both undermined by the unlawful regulations challenged here.

13. Plaintiff Southeastern Lumber Manufacturers Association, Inc. ("SLMA") is a nonprofit organization with its principal place of business in Forest Park, Georgia. Its purpose is to promote the timber products manufactured by its members, who are small sawmill and planing mill operators in the Southeast. Much of the timber supply on which their mills depend comes from private lands throughout the Southeastern United States, a region in which the endangered red-cockaded woodpecker ("RCW") lives. Because of RCW-based curtailments imposed by the Forest Service on timber harvesting in National Forests in the Southeast and the threat of "taking" enforcement actions on private lands under the ESA, as applied through the challenged regulation defining "harm", SLMA members fear that they may wrongfully be deprived of their ability to continue in business and that their families and communities will suffer accordingly. SLMA therefore brings this lawsuit on its own behalf, for damage to its organizational interests, and on behalf of its adversely affected members.

14. Plaintiff Southern Timber Purchasers Council ("STPC") is a trade association with its principal place of business in Atlanta, Georgia. Its purpose is to promote the interests of its members who are purchasers of timber in the Southeastern Region of the United States. Its members depend on a timber supply from the Southeast, a region in which the endangered red-cockaded woodpecker ("RCW") lives. Timber harvest volumes in the Southeast have been reduced as a result of a court injunction to prevent "harm" type takings of the RCW and as a result of Forest Service initiatives in the rest of the region to prevent "harm" type takings. Because of these curtailments and the threat of takings enforcement actions under ESA § 9, as applied through the challenged regulations, the STPC members fear they may be wrongfully deprived of their ability to continue in business. The STPC brings this lawsuit on its own behalf and on behalf of its adversely affected members.

B. *Defendants*

15. Defendant Manuel Lujan, Jr., is the Secretary of the Interior ("Secretary"). The ESA confers rulemaking authority on the Secretary, and that authority was exercised in adopting the challenged regulations. Defendant Lujan is sued in his official capacity, and in that capacity he resides in Washington, D.C.

16. Defendant John F. Turner is the Director of the U.S. Fish and Wildlife Service ("FWS"), an agency within the U.S. Department of the Interior. The Secretary has delegated most of his ESA authority to the FWS Director, and that authority has been exercised in adopting the challenged regulations. Defendant Turner is sued in his official capacity, and in that capacity he resides in Washington, D.C.

CLAIMS FOR RELIEF

I. The Secretary's Definition of "Harm," at 50 C.F.R. § 17.3, Is Inconsistent with the ESA and Unlawfully Expands the ESA's "Take" Prohibitions

17. Paragraphs 1 through 16 are incorporated by reference.

18. Section 9 of the ESA makes it unlawful to "take" an endangered wildlife species. 16 U.S.C. § 1538 (a)(1)(B). A violation of § 9 may be punished by civil and criminal penalties. *Id.* § 1540.

19. "Take" is defined in the ESA as meaning "to harass, harm, pursue, hunt, shoot, wound, kill, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19). The ESA does not define these component terms.

20. One of the component terms—"harm"—is defined in the Secretary's regulations to mean:

> an act which actually kills or injures wildlife. Such act *may include significant habitat modification* or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3 (emphasis added).

21. It is only through this regulatory definition of "harm" that the modification of habitat directly becomes a "take."

22. The definition of "harm" at 50 C.F.R. § 17.3 violates the ESA for at least the following reasons:

(a) It is inconsistent with the plain language of the ESA.

(b) It is inconsistent with the legislative history of the ESA, which demonstrates that Congress *specifically rejected* the inclusion of habitat modification as a prohibited take and instead

addressed habitat modification through other provisions of the ESA.

(c) It renders other provisions of the ESA meaningless, including without limitation the "jeopardy" provisions of ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2).

(d) It creates *de facto* "critical habitat" without benefit of the statutory protections for designating such habitat, including notice-and-comment rulemaking and a consideration of the relevant economic impacts of such a designation.

23. The definition of "harm" at 50 C.F.R. § 17.3 has been and continues to be relied on by Defendants and other Federal and State officials in enforcing the "take" prohibition of ESA § 9.

24. In July 1990, for instance, in its broadest application to date, the definition of "harm" at 50 C.F.R. § 17.3 was relied on by Region 1 of the FWS in its issuance of a document entitled, "Procedures Leading to Endangered Species Act Compliance for the Northern Spotted Owl" ("Guidelines"). The Guidelines make it clear that timber harvesting or other habitat modification in an area as large as 3,960 acres surrounding an owl nest site or activity center will be cause for consideration of an ESA "take" prosecution. The Guidelines apply to private as well as public lands.

25. As a result of the enforcement reliance on the definition of "harm" at 50 C.F.R. § 17.3, the timber supply has been sharply curtailed on private lands in the Pacific Northwest and threatens similarly to be sharply curtailed on private lands in the Southeast. Because the regulatory definition unlawfully expands the ESA "take" prohibitions, the curtailments have occurred and threaten to occur throughout areas and for reasons far broader than Congress intended in the ESA.

26. Plaintiffs have been and will continue to be adversely affected by these overbroad curtailments, not only

through the economic injuries associated with job losses and business failures, but also through consequent social injuries such as decreased revenues for schools and other public services and increases in domestic violence, child abuse, drug and alcohol abuse, and homelessness.

27. On February 21, 1991, several of the Plaintiffs sent a 60-day notice of an ESA citizen suit to Defendants, as required by 16 U.S.C. § 1540(g). The notice advised Defendants of this claim, but no remedial action has been taken by Defendants.

II. The Secretary's Blanket Extension of the ESA's "Take" Prohibition to All Threatened Species, in 50 C.F.R. § 17.31(a), Is Inconsistent With the ESA

28. Paragraph 1 through 27 are incorporated by reference.

29. By its terms, the ESA prohibits only the taking of endangered species. It does not prohibit the taking of threatened species.

30. Section 4(d) of the ESA authorizes the Secretary to extend the taking prohibitions to individual threatened species, but he must do so "by regulation" and may do so only when "necessary and advisable to provide for the conservation of such species." 16 U.S.C. § 1533(d).

31. Despite the limiting requirements of ESA § 4, the Secretary has automatically extended the taking prohibition to *all* threatened species in 50 C.F.R. § 17.31(a).

32. The Secretary's regulation at 50 C.F.R. § 17.31(a) is inconsistent with the ESA and unlawfully expands the "take" prohibition of ESA § 9. Among other things, the Secretary's regulation operates to circumvent the Secretary's statutory obligation (a) to determine whether and to what extent the prohibitions should be applied to each individual threatened species, and (b) to make the "necessary and advisable" findings required to support those determinations. As a result, the Secretary has deprived the public of its statutory right to an explanation of the

reasons for applying the taking prohibitions to particular threatened species.

33. The Secretary's regulation at 50 C.F.R. § 17.31(a) has been and continues to be relied on by Defendants and other Federal and State officials to apply the ESA's "take" prohibition to certain threatened species, such as the spotted owl, despite the absence of a determination that the application of the prohibition is "necessary and advisable to provide for the conservation of such species" and the absence of a regulation reflecting that determination.

34. As a result, timber harvesting has been sharply curtailed throughout areas and for reasons far broader than Congress intended or the ESA contemplates. This unlawful expansion of the "take" prohibition to *all* threatened species, without regard to the statutory mandates, has adversely affected Plaintiffs and will continue to do so, causing them not only economic injury through job losses and business failures, but also consequent social injuries such as decreased revenues for schools and other public services and increases in domestic violence, child abuse, drug and alcohol abuse, and homelessness.

35. On February 21, 1991, several of the Plaintiffs sent a 60-day notice of an ESA citizen suit to Defendants, as required by 16 U.S.C. § 1540(g). The notice advised Defendants of this claim, but no remedial action has been taken by Defendants.

III. The Secretary's Definition of "Harm," at 50 C.F.R. § 17.3, Is Void for Vagueness

36. Paragraphs 1 through 35 are incorporated by reference.

37. Under ESA § 11, 16 U.S.C. § 1540, criminal and civil sanctions may be imposed upon persons who violate the "take" prohibition of ESA § 9. Since "harm" is a form of "take," those sanctions may be applied to per-

sons whose actions constitute "harm" as defined in 50 C.F.R. § 17.3.

38. The regulatory definition of "harm" fails to provide a discernible standard, and therefore prevents affected persons from adjusting their actions to avoid those sanctions. The regulation is therefore inconsistent with law because it is unconstitutionally vague.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that the Court:

(1) Adjudge and declare that the challenged regulations, 50 C.F.R. § 17.3 (definition of "harm") and 50 C.F.R. § 17.31(a), are inconsistent with law;

(2) Set aside the challenged regulations and remand them to the Secretary;

(3) Enjoin the Defendants from seeking, either directly or indirectly, to enforce or apply the challenged regulations;

(4) Award Plaintiffs their costs and fees; and

(5) Grant Plaintiffs such further relief as may be appropriate.

Respectfully submitted,

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Dated: June 14, 1991

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 91-1468

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, ET AL., PLAINTIFFS

v.

MANUAL LUJAN, JR., Secretary of the Interior, JOHN F. TURNER, Director, U.S. Fish and Wildlife Service, DEFENDANTS

ANSWER

COME NOW Federal Defendants Manual Lujan, Jr., Secretary of the Department of the Interior, and John F. Turner, Director, United States Fish and Wildlife Service, and through undersigned counsel submit the following Answer to plaintiffs' Complaint for Declaratory and Injunctive Relief:

1. The allegations contained in the first paragraph of Paragraph 1 are characterizations of plaintiffs' Complaint and require no response. The first sentence of the second paragraph of Paragraph 1 is a description of the Endangered Species Act, 16 U.S.C. 1531 *et seq.*, which speaks for itself. Federal Defendants deny the allegations contained in the balance of Paragraph 1.

2. The allegations contained in Paragraph 2 are conclusions of law which require no response. To the extent a response is required, they are admitted.

3. The allegations contained in Paragraph 3 are conclusions of law which require no response. To the extent a response is required, they are admitted.

4. Federal Defendants are without sufficient information or knowledge to form a belief as to the allegations contained in Paragraph 4.

5. Federal Defendants are without sufficient information or knowledge to form a belief as to the allegations contained in Paragraph 5.

6. Federal Defendants are without sufficient information or knowledge to form a belief as to the allegations contained in Paragraph 6.

7. Federal Defendants are without sufficient information or knowledge to form a belief as to the allegations contained in Paragraph 7.

8. Federal Defendants are without sufficient information or knowledge to form a belief as to the allegations contained in Paragraph 8.

9. Federal Defendants are without sufficient information or knowledge to form a belief as to the allegations contained in Paragraph 9.

10. Federal Defendants are without sufficient information or knowledge to form a belief as to the allegations contained in Paragraph 10.

11. Federal Defendants are without sufficient information or knowledge to form a belief as to the allegations contained in Paragraph 11.

12. Federal Defendants are without sufficient information or knowledge to form a belief as to the allegations contained in Paragraph 12.

13. Federal Defendants are without sufficient information or knowledge to form a belief as to the allegations contained in Paragraph 13, except to admit that the range of the endangered red-cockaded woodpecker extends into the Southeastern United States.

14. Federal Defendants are without sufficient information or knowledge to form a belief as to the allegations contained in Paragraph 14, except to admit that the range of the endangered red-cockaded woodpecker extends into the Southeastern United States.

15. The allegations contained in Paragraph 15 are admitted.

16. The allegations contained in Paragraph 16 are admitted.

17. Federal Defendants incorporate by reference the Answers to Paragraphs 1 through 16.

18. The allegations of Paragraph 18 are descriptions of the Endangered Species Act, 16 U.S.C. 1531 *et seq.*, which speaks for itself.

19. The allegations of Paragraph 19 are descriptions of the Endangered Species Act, 16 U.S.C. 1531 *et seq.*, which speaks for itself.

20. The allegations of Paragraph 20 are descriptions of a regulation promulgated under the Endangered Species Act, 16 U.S.C. 1531 *et seq.*, which speaks for itself.

21. The allegations of Paragraph 21 are denied.

22. The allegations of Paragraph 22 are denied.

23. The allegations of Paragraph 23 are admitted except to deny for lack of sufficient information and knowledge to form a belief as to whether "[t]he definition of 'harm' at 50 CFR 17.3 has been and continues to be relied on by" "other Federal and States officials in enforcing the 'take' prohibition of ESA § 9."

24. The allegations of Paragraph 24 are denied except to admit that Region 1 of the U.S. Fish and Wildlife Service issued a document in July 1990 entitled "Procedures Leading to Endangered Species Act Compliance for the Northern Spotted Owl," which speaks for itself.

25. The allegations of the first sentence of Paragraph 25 are denied for lack of sufficient information and knowledge to form a belief therein; the allegations of the second sentence of Paragraph 25 are denied.

26. The allegations of the first clause of Paragraph 26 which refer to "overbroad curtailments" are specifically denied; the balance of the allegations of Paragraph 26 are denied for lack of sufficient information and knowledge to form a belief therein.

27. The allegations of Paragraph 27 are admitted.

28. Federal Defendants incorporate by reference the Answers to Paragraphs 1 through 28.

29. The allegations of Paragraph 29 are descriptions of the Endangered Species Act, 16 U.S.C. 1531 *et seq.*, which speaks for itself; the allegations further call for a conclusion of law which requires no response.

30. The allegations of Paragraph 30 are descriptions of Section 4(d) of the Endangered Species Act, 16 U.S.C. 1533(d), which speaks for itself.

31. The allegations of Paragraph 31 are descriptions of 50 CFR 17.31(a) which speaks for itself. To the extent the allegations of Paragraph 31 require a response they are denied.

32. The allegations of Paragraph 32 are denied.

33. The allegations of Paragraph 33 which state that "[t]he Secretary's regulation at 50 CFR 17.31(a) has been and continues to be relied on" by Federal Defendants "to apply the ESA's 'take' prohibition to certain threatened species" are admitted. Federal Defendants deny for lack of sufficient knowledge and information to form a belief therein as to other Federal and State officials' actions in this regard. The balance of the allegations contained in Paragraph 33 are denied.

34. The allegations contained in the first sentence of Paragraph 34 which state that "timber harvesting has been sharply curtailed throughout areas" are denied for lack of sufficient knowledge and information to form a belief therein and the balance of the allegations contained in the first sentence of Paragraph 34 are denied. The allegations contained in the second sentence of Paragraph 34 are specifically denied as to plaintiffs Southeastern Lumber Manufacturers Association and Southern Timber Purchasers Council. The allegations contained in the second sentence of Paragraph 34 which state that plaintiffs will

be economically or socially injured by the allegedly "unlawful expansion of the 'take' prohibition" to threatened species are specifically denied; the balance of the allegations contained in paragraph 34 are denied for lack of sufficient information and knowledge to form a belief therein.

35. The allegations contained in Paragraph 35 are admitted.

36. Federal Defendants incorporate by reference the Answers to Paragraphs 1-35.

37. The allegations contained in Paragraph 37 are descriptions of the Endangered Species Act, 16 U.S.C. 1531 *et seq.*, which speaks for itself.

38. The allegations contained in Paragraph 38 are legal conclusions requiring no response but to the extent a response is required they are denied.

AFFIRMATIVE DEFENSES

1. The Complaint fails to state a claim upon which relief may be granted.

2. Plaintiffs Southeastern Lumber Manufacturers Association and Southern Timber Purchasers Council have no standing as to the second claim for relief.

Respectfully submitted,

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PROCEDURES LEADING TO ENDANGERED SPECIES ACT COMPLIANCE FOR THE NORTHERN SPOTTED OWL

Including:

- Formal Section 7 Consultation Guidance
- Interim Recovery Strategy
- Conservation Planning for Non-Federal Actions
- Guidance for Incidental Take

U.S. Fish and Wildlife Service
Region 1
July 1990

This document was prepared by the U.S. Fish and Wildlife Service in Region 1, Portland, Oregon. For further information, please contact the following offices.

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OWL PROCEDURES MANUAL

INTRODUCTION

With a listing decision now made for the northern spotted owl and an effective date of July 23, 1990, many people are wondering exactly what changes may occur to timber harvest programs in order to adequately protect the owl. In this document, the U.S. Fish and Wildlife Service (Service) describes its consultation, recovery, law enforcement (taking) guidelines, and conservation planning processes in an attempt to lay out procedures that are consistent with provisions of the Endangered Species Act (ESA), applicable on the effective date for listing of the northern spotted owl. With the cooperation of the other Federal agencies, as well as State and private entities, these guidelines outline the most efficient way of doing business under the ESA, at least for the first year after a listing, and would help meet the goals of other applicable laws and regulations.

PURPOSES

1. To provide clear examples of how ESA processes may work for the spotted owl.
2. To provide clarification of the Service's view of the Interagency Scientific Committee's (ISC) conservation strategy.
3. To put ESA spotted owl guidance in an understandable, manual-type format for distribution to Federal and non-Federal sectors as a working document.

BACKGROUND

- SECTION OF THE ESA—FORMAL CONSULTATION FOR FEDERAL ACTIONS

Federal agencies that fund, authorize, or carry out actions which "may affect" listed species must consult with the Service under Section 7. Federal actions that are nondis-

cretionary or that have "no adverse effects" on listed species are not subject to formal consultation. For timber harvest activities, the "may affect" standard applies to harvest activities within suitable owl habitat, as well as any harvest activities within a ½ mile radius of any known nest site or pair activity center. The Service believes that these actions represent a threshold standard for timber activities requiring formal Section 7 consultation.

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It is not possible to determine an exact point at which the continued existence of a species would be at jeopardy without fully analyzing proposed actions in relation to the environmental baseline. Therefore, the Service will analyze each Federal action submitted for formal consultation in turn and will make the "likely jeopardy/not likely jeopardy" finding on a case-by-case basis.

- INCIDENTAL TAKE GUIDELINES UNDER SECTIONS 7 AND 10

The taking of any listed species is generally prohibited under Section 9 of the ESA and implementing regulations. There are, however, a number of exceptions to the taking prohibition.

The 1982 Amendments to the ESA gave the Service procedures to authorize the "incidental take" of listed wildlife species. These procedures are contained in Sections 7 and 10 of the ESA. "Incidental take" in this context is take which is "incidental to, and not the purpose of, carrying out otherwise lawful activities" (See 16 USC 1539 and *Sec.* 10(a)(1)(B) of the ESA).

The Service offers the following general guidance to address "incidental" take of northern spotted owls that may occur incidentally to timber harvest or related activities. The Service gives notice that any incidental take of northern spotted owls that results from activities carried out in

a manner inconsistent with the guidelines (and not authorized under the provisions of Section 7 or Section 10 of the Act), will be subject to investigation by the Service pursuant to Section 9 of the Act.

It is important to note that the Service fully intends to consider all requests for incidental take authorizations under Section 7 (Federal) or Section 10 (State and private) of the Act, as appropriate. These interim guidelines are intended to present, to the best of our ability, guidance for addressing the need for incidental take authorization; and therefore to provide guidance for reducing potential conflicts with Section 9 of the Act.

An obvious incidental take situation would exist if an otherwise lawful timber harvest activity would result in the direct loss of any individual (adult or young), or an active nest (with young or eggs). It is more difficult to determine when incidental take of owls might occur as a result of altering habitat surrounding a nest site or activity center of a pair of spotted owls.

Even more difficult is assessing when owls may be harmed or harassed by cutting within their home range. In these less obvious situations, the Service recommends that the project proponent initiate a dialogue with the Service to discuss the potential risk of incidental take. In the absence of such dialogue, the Service offers the following stepwise approach which we believe is a reasonable procedure to reduce the risk that incidental take will occur. If the person engaged in timber harvest can demonstrate that these guidelines were followed, the Service does not intend to seek prosecution in the unlikely event that incidental take occurs in spite of implementing the guidelines.

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The focus of our incidental take guidelines is on northern spotted owls, including their eggs and young. We therefore recommend the following stepwise approach to avoid or reduce the risk of incidental take:

1. Conduct spotted owl surveys during the breeding season and prior to any harvest activity according to the Forest Service protocols addressed in the Interagency Scientific Committee report. The Service may suggest other owl survey techniques in the near future. Such surveys should be a standard practice for planning timber harvest activities.

2. Avoid any harvest activity which results in less than 70 acres of the best available suitable owl habitat encompassing the nest site and/or activity center of a pair of spotted owls.

3. Avoid any harvest activity which results in less than 500 acres of suitable habitat within a 0.7-mile radius (1000 acres) of a nest site and/or activity center. The 500 acres may include the 70 acres in No. 2 above and should be as contiguous as possible.

4. Avoid any harvest activity which results in less than a 40 percent coverage by suitable owl habitat within a circle with a radius centered on a nest site and/or center of activity and as prescribed by physiographic province (see Table 2). The 40 percent may include the acreage required in No. 2 and No. 3 above.

The Service recognizes that there is variation among individuals. Specific information on home range size, habitat use, nest site, or the center of activity of well-studied owls in similar habitat in the same portion of the range could be used to justify an exception to these guidelines and continue to avoid incidental take. In addition, habitat use information on which the above recommendations are based (see ISC 1990, USDI 1990) may change as a result of more recent studies, and the Service will continue to update its database to ensure that the most recent information is included.

To summarize the procedures for pursuing incidental take authorization for non-Federal activities, if incidental take is identified as a concern on State or private lands, individual landowners should consider development of a habitat conservation plan. The Section 10 (a)(1)(B) permit application can be submitted separately by individual applicants or through the appropriate State agency as described in the discussion on Section 10 permits in this document. The Service strongly encourages a pre-application dialogue with any potential permit applicant at any time.

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Table 2. Calculations to Develop Incidental Take Guidelines Based upon Home Range Size by Physiographic Province [1]

Province	Median Home Range Size		40 Percent of Median Home Range Size
	Acres	Radius	Acres
WASHINGTON			
Olympic Peninsula	9900	2.2 miles	3960
Cascades	6600	1.8 miles	2640
OREGON			
Cascades	2500	1.2 miles	1000
Coast Range	3400	1.3 miles	1330
Klamath	2500	1.2 miles	1000
CALIFORNIA			
Klamath	2500	1.2 miles	1000

[1] The Service will continue to revise this table as more data become available.

References:

Interagency Scientific Committee. 1990. Conservation strategy for the northern spotted owl. Report of the Interagency Scientific Committee to address the conservation of the northern spotted owl. U.S. Department of Agriculture, Forest Service, and U.S. Department of the Interior, Fish and Wildlife Service, Bureau of Land Management, and National Park Service. Portland, Oregon.

U.S. Department of the Interior. 1990. 1990 Status Review. Northern Spotted Owl. Report to the U.S. Fish and Wildlife Service. Portland, Oregon.

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• HABITAT CONSERVATION PLANNING UNDER SECTIONS 9 AND 10

A permit from the Service pursuant to Section 10(a)(1)(B) of the ESA authorizes incidental take much as a Section 7 consultation does through an "Incidental Take Statement" for Federal actions. However, Section 10 of the ESA typically applies to non-Federal actions. Individuals, corporations, non-Federal government entities, States, and other parties can apply for an incidental take permit by submitting an application and a habitat conservation plan to the Service. "Conservation Planning" is the term often used to refer to this process. In the case of the owl, the Service recommends maximizing efficiency of effort by developing a habitat conservation plan which includes the incidental take requests for a number of entities through the appropriate State land-managing agency.

The issuance of an incidental take permit by the Service is contingent upon the applicant's development of a Service-approved conservation plan for the listed species affected by the subject project or action (a more detailed document, "Draft Conservation Planning Guidelines," is available from the Service's Portland Regional Office). Such a conservation plan must specify:

1. The anticipated impacts likely to result in take of listed species;
2. the mitigation and monitoring measures the applicant will undertake to alleviate the impacts of the taking;
3. alternative actions to such taking that were considered;
4. why these alternatives were not employed;
5. funding that will be provided to implement the mitigation measures and attendant conservation plan; and

6. additional measures that the Service may require as necessary or appropriate for the conservation of the species.

Because applicants may have difficulty in adequately addressing these conservation planning needs independently, the Service generally works with an applicant throughout the pre-application phase. Adequate quantification of impacts (i.e., incidental take) usually requires that the applicant: (1) define the conservation planning, (2) collect necessary biological data on the species of concern, and (3) detail the proposed activities likely resulting in incidental take.

Upon receipt of the application and conservation plan, the Service may issue an incidental take permit if it determines that the following conditions have been met:

1. the taking will be incidental to the action;
2. the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of taking;
3. the applicant will ensure that adequate funding will be provided for the conservation plan and procedures to deal with unforeseen circumstances;
4. the taking will not appreciably reduce the likelihood of the survival and recovery of the subject species in the wild;
5. the applicant will ensure that other measures required by the Service will be provided; and

[Page 13]

6. the plan will be implemented.

The third item above generally requires the development of an implementing agreement, which is a legal document binding all implementing parties to the proposed conservation plan.

The Service must also address the National Environmental Policy Act (NEPA) in the ESA Section 10(a)(1)(B)

permit process. In most cases the Service delegates the development of information needed for preparation of NEPA documentation to the applicant to expedite the process. In general, if the incidental take permit will result in a significant net loss of individuals and/or habitat, an EIS likely will be required. This often adds 9 months to 1 year to the process. Conversely, if the permit will result in a net gain or insignificant net loss of individuals and/or habitat, an environmental assessment leading to a finding of no significant impact likely will be sufficient for NEPA compliance. In such a scenario, a permit could be considered for issuance in as little as 3 months.

Section 10 and Northern Spotted Owls

Timber harvest on State and private lands may result in the incidental take of northern spotted owls. Because the States authorize private timber harvest, they may be party to take on private lands, as well as on State lands. In the absence of an incidental take permit, this take would be a violation of ESA. The implications for the northern spotted owl are considerable, since a large portion of the total harvest volume in the owl's range comes from non-Federal lands. At least in California, important numbers of owls occur on private lands; there are fewer owls on private lands in Washington and Oregon.

There are two approaches to managing the Section 10 process for spotted owls. One is for the individual landowner to prepare an HCP and apply for an incidental take permit for his lands. The second is for the State to prepare an HCP for all state and private timber lands. The Service would prefer to proceed with the latter approach, since it would add efficiency to the conservation planning process.

The States of Washington, Oregon, and California are at different stages in this process. In Washington and Oregon, the Service has notified the States of their potential

responsibilities and initial informational discussions are beginning. In California, the State Board of Forestry, Department of Forestry, Department of Fish and Game, industry representatives, and the Service have been meeting regularly since November, 1989.

The State of California is planning to prepare an HCP covering timber management throughout the range of the subspecies in the state. The California HCP and accompanying NEPA process probably may not be completed until sometime in 1991. During the interim period, the State would attempt to prevent take through a review process that supplements its existing timber harvest permit procedure. In the meantime, large industrial timber firms have indicated their intent to proceed with individual HCPs.

Federal Register/Vol. 40, No. 188
Friday, September 26, 1975/Rules and Regulations

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service -

[Page 44,412]

Title 50—Wildlife and Fisheries

CHAPTER I—UNITED STATES FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR

SUBCHAPTER B—TAKING, POSSESSION, TRANSPORTATION, SALE, PURCHASE, BARTER, EXPORTATION, AND IMPORTATION OF WILDLIFE.

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

Reclassification of the American Alligator and Other Amendments

On July 8, 1975, the Service proposed certain changes in regulations on endangered and threatened wildlife (40 FR 28712). The proposal would reclassify the American alligator, removing it completely from an endangered or threatened status in a portion of its range. It also would add new provisions to Part 17 on similarity of appearance, on captive, self-sustaining populations, and on interpretations of prohibitions applicable to endangered and threatened wildlife. Finally, the proposal would establish a new format for lists of endangered and threatened wildlife. With the changes noted in this preamble, this rulemaking adopts the proposal, effective September 26, 1975.

* * * * *

[Page 44,413]

SUBPART A (INTRODUCTION AND GENERAL PROVISIONS)

In the proposal, Subpart A contained a series of definitions necessary for proper implementation of the Act. Especially notable were the definitions of "industry and trade", which clarified the scope of some of the interstate commerce prohibitions, and of "harass", which clarified the scope of the prohibition on taking. The definition of "harass" has been retained in a modified form in this final rulemaking, to make it applicable to actions or omissions with the potential for injury. The concept of environmental damage being considered a "taking" has been retained, but is now found in a new definition, of the word "harm". "Harm" covers actions or omissions which actually, (as opposed to potentially), cause injury. In addition, the definition of "harass" has been modified by restricting its application to acts or omissions which are done intentionally or negligently. In the proposal, "harass" would have applied to any action, regardless of intent or negligence. Also, definitions of "endangered" and "threatened" have been added.

By moving the concept of environmental degradation to the definition of "harm", potential restrictions on environmental modifications are expressly limited to those actions causing actual death or injury to a protected species of fish or wildlife. The actual consequences of such an action upon a listed species is paramount.

These environmental restrictions represent a reasonable response to the habitat needs of listed species. Congress specifically acknowledged these needs by stating in the "Purposes" subsection of the Act: "The purposes of this Act are to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved . . ." (87 Stat. 285, Section 2(b), 16 U.S.C. 1531(b)). Furthermore, Congress acknowledged that a rational relationship existed between the protection of the needs of listed species and the public welfare: "The Con-

gress finds and declares that . . . (3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational and scientific value to the Nation and its people . . ." (87 Stat. 884, Section 2(a)(3), 16 U.S.C. Section 1541(3)).

It should be noted that this definition of "harm" which includes significant environmental modification, does not permanently limit the environmental modifications that are permissible for the habitat of a listed species of fish or wildlife. If the species was originally classified as endangered and made a significant recovery, it could be downlisted to threatened with regulations that don't prohibit "takings". Second, the species could recover completely and be delisted altogether. Finally, the species in question could abandon its use of the area. In all of these situations, the limited restrictions on environmental modification under the definition of "harm" would be removed.

* * * * *

[Final rule, page 44,146]

§ 17.3

"Harm" in the definition of "take" in the Act means an act or omission which actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavioral patterns, which include, but are not limited to, breeding, feeding or sheltering; significant environmental modification or degradation which has such effects is included within the meaning of "harm";

* * * * *

Federal Register/Vol. 46, No. 105
Tuesday, June 2, 1981/Proposed Rules

[Page 29,490]

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Proposed Redefinition of "Harm"

AGENCY: Fish and Wildlife Service, Interior Department.

ACTION: Proposed rule.

SUMMARY: This proposed rule is a redefinition of the Service regulations defining "harm" under Section 9 of the Endangered Species Act, 50 CFR 17.3. "Harm" would be redefined to mean an act or omission which injures or kills an endangered or threatened species of wildlife rather than the broader present interpretation which can be read to include significant environmental modification or degradation without further proof of actual injury or death to a listed species. This redefinition is proposed to eliminate the confusion that commentators and courts have had with the present definition.

DATE: Comments on this proposed rule must be submitted on or before August 3, 1991.

ADDRESSES: Interested persons or organizations are requested to submit comments to the Director (OES), United States Fish and Wildlife Service, Department of the Interior, Washington, D.C. 20240. Comments and materials relating to this rule are available for public in-

spection by appointment during normal business hours at the Service's Office of Endangered Species, Suite 500, 1000 North Glebe Road, Arlington, Virginia.

FOR FURTHER INFORMATION CONTACT: Mr. John L. Spinks, Jr., Chief, Office of Endangered Species (703/235-2771).

SUPPLEMENTARY INFORMATION: This Fish and Wildlife Service and the Office of the Solicitor recently completed a review of the Fish and Wildlife Service definition of "harm" in its regulations under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* That review was prompted by the confusion which the courts and commentators seem to have had with the definition the few times they have dealt with it, and by the uniform opinion of legal commentators that the present definition goes beyond intent of Congress. Bean, *The Evolution of National Wildlife Law*, 395-97 (1977); Note, *Endangered Species Act: Constitutional Tension and Regulatory Discord*, 4 Colum. J. Envt'l L. 97, 100 n. 19 (1977); Note, *Endangered Species Act of 1973: Preservation or Pandemonium?*, 5 Envt'l L. 29, 38-41 (1974); Note, *Obligations of Federal Agencies Under Section 7 of the Endangered Species Act of 1973*, 28 Stan. L. Rev. 1247, 1251 n. 31 (1976).

Section 9 of the Endangered Species Act (ESA), 16 U.S.C. 1538, makes it illegal to "take" an endangered species of fish or wildlife. That term is defined as follows:

> The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct.

16 U.S.C. 1531(19). Fish and Wildlife Service Regulations define "harm" as follows:

> "Harm" in the definition of "take" in the Act means an act or omission which actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavioral patterns, which include, but are not limited to,

> breeding, feeding or sheltering; significant environmental modification or degradation which has such effects is included within the meaning of "harm."

50 CFR 17.3.

This definition contains a significant ambiguity. If the words "such effects" are read to refer to the phrase "significantly disrupt essential behavioral patterns," then any significant environmental modification or degradation that disrupts essential behavioral patterns will fall under the definition of harm, regardless of whether an actual killing or injuring of a listed species of wildlife is demonstrated. Under such an interpretation, a showing of habitat modification alone would be sufficient to invoke the criminal penalties of Section 9.

In an opinion dated April 17, 1981, the Solicitor's Office concluded that such a result is inconsistent with the intent of Congress.

The Service notes that although the definition of "harm" has been the subject of a number of privately initiated civil environmental actions, in none of those lawsuits was the underlying validity of the present definition reviewed or briefed. The Service also notes that there has never been a prosecution initiated by the Fish and Wildlife Service under the present definition and the redefinition is not expected to have any significant effect on future enforcement actions or strategy.

Therefore, in light of the April 17, 1981 Solicitor's Office opinion, the Service believes that it is appropriate to redefine "harm" under the Endangered Species Act.

Appendix

Although it will not appear in the Code of Federal Regulations, a copy of the opinion of the Solicitor's Office is attached as an Appendix solely for purposes of public information.

National Environmental Policy Act

A draft environmental assessment has been prepared in conjunction with this proposal. It is on file in the Office of Endangered Species, Suite 500, 1000 North Glebe Road, Arlington, Virginia, and may be examined by appointment during regular business hours. A determination will be made at the time of final rulemaking as to whether this is a major Federal Action which would significantly affect the quality of the human environment within the meaning of Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(C).

Primary Author

This proposal was written by David C. Cannon, Jr., Office of the Solicitor, Department of the Interior, Washington, D.C. 20240. (202/343-2172).

Note.—The Department of the Interior has determined that this is not a major rule and does not require preparation of a regulatory analysis under Executive Order 12291.

The Department has also determined that the rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act. These determinations are discussed in more detail in a Determination of Effects which has been prepared by the U.S. Fish and Wildlife Service.

Proposal of Regulation

§ 17.3 [Amended]

Accordingly, it is hereby proposed to amend 50 CFR 17.3 by removing the existing definition of "harm" and inserting the following:

* * * * *

"Harm" in the definition of "take" in the Act means an act or omission which injures or kills wildlife.

Dated: May 11, 1981.

* * * * *

C. F. Layton,

Acting Deputy Assistant Secretary, Fish and Wildlife and Parks.

April 17, 1981.

Memorandum

To: Director, Fish and Wildlife Service

From: Associate Solicitor, Conservation and Wildlife

Subject: Fish and Wildlife Service

Regulations Defining "Harm" under Section 9 of the Endangered Species Act

This memorandum examines the statutory authority underlying the definition of "harm" contained in FWS regulations implementing Section 9 of the Endangered Species Act, 16 U.S.C. 1538. We conclude that the present definition exceeds the scope of authority conferred by Section 9. We recommend that the Service's definition of "harm" be clarified so that only those habitat modifications that [page 29,491] actually injure or kill wildlife are subject to Section 9 criminal penalties.

Discussion

Section 9 of the Endangered Species Act (ESA), 16 U.S.C. 1538, makes it illegal to "take" an endangered species of fish or wildlife. That term is defined as follows:

The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct.

16 U.S.C. 1532(1). Fish and Wildlife Service Regulations define "harm" as follows:

"Harm" in the definition of "take" in the Act means an act or omission which actually injures or kills wildlife, including acts which annoy it to such an extent as to

significantly disrupt essential behavioral patterns, which include, but are not limited to, breeding, feeding or sheltering; *significant environmental modification or degradation which has such effects is included within the meaning of "harm."*

50 C.F.R. 17.3 (emphasis added).

This definition contains a significant ambiguity. If the words "such effects" are read to refer to the phrase "significantly disrupt essential behavorial patterns," then any significant environmental modification or degradation that disrupts essential behavioral patterns will fall under the definition of harm, regardless of whether an actual killing or injuring of wildlife is demonstrated. Under such an interpretation a showing of habitat modification *alone* would be sufficient to invoke the criminal penalties of Section 9. As discussed below, such a result is inconsistent with the intent of Congress.[1]

A. The Endangered Species Act

ESA concerns itself with two major causes of species decline: (1) the commercial and sport taking of individual animals, and (2) the destruction or degradation of species' habitats. The Act creates a bifurcated system for dealing with these distinct problems. Section 7, 16 U.S.C. 1536, requires federal agencies to insure that actions taken are not likely "to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such

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[1] Each of the four published articles that has considered the subject concludes that the Service's definition is overbroad. Bean, *The Evolution of National Wildlife Law* 395-97 (1977); Note, *Endangered Species Act: Constitutional Tension and Regulatory Discord*, 4 Colum. J. Envt'l L. 97, 100 n. 19 (1977): Note, *Endangered Species of 1973: Preservation or Pandemonium? 5 Envt'l L. 29, 30-41 (1974): Note, Obligations of Federal Agencies Under Section 7 of the Endangered Species Act of 1973*, 28 Stan. L. Rev. 1247, 1251 n. 31 (1978).

species . . ." Further, Section 5 authorizes land acquisitions as an additional means for preserving the habitat of listed species. 16 U.S.C. § 1534. Together, these two sections were designed to address the threatened destruction of habitat for listed species. Section 9, on the other hand, prohibits all action that constitute an actual taking of an endangered species of fish or wildlife. 16 U.S.C. 1538.

The Act's definition of "take" contains a list of actions that illustrate the intended scope of the term: harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct. With the possible exception of "harm," these terms all represent forms of conduct that are directed against and likely to injure or kill *individual* wildlife. Under the principle of statutory construction, *ejusdem generis*, where general words accompany words of specific meaning, such general words are construed as applying only to actions of the same class as those specifically mentioned. *Goldsmith v. U.S.* 42 F.2d 133 (2d (Cir. 1948). Applying this principle to the present construction problem, the term "harm" should be interpreted to include only those actions that are directed against, and likely to injure or kill, individual wildlife.

Also applicable here is the rule that provisions of a statute should not be construed in a manner that renders other provisions of the statute superfluous. If the Service's definition of "harm" is interpreted to prevent habitat modifications, without a further finding of actual injury to a listed species, Section 9 could be violated in most instances in which Section 7 consultation is called for. That is, it would be counterproductive for a federal agency to initiate Section 7 consultation over a proposed private action that would significantly modify a listed species habitat, if such private activity were already proscribed under Section 9. Such a construction would render Section 7 largely unnecessary. *See Bean supra* n. 1 at 397.

B. Legislative History

The legislative history reinforces the distinction between the taking prohibition of Section 9 and the habitat protection provisions of Section 7. Representative Sullivan, whose committee reported the House bill, stated:

For the most part, the principal threat to animals stems from the destruction of their *habitat*. The destruction may be intentional, as would be the case in clearing of fields and forests for development of resource extraction, or it may be unintentional, as in the case of the spread of pesticides beyond their target area. Whether it is intentional or not, however, the result is unfortunate for the species of animals that depends on that habitat, most [of] whom are already living on the edge of survival. H.R. 37 will meet this problem by providing funds for acquisition of critical habitat. It will also enable the Department of Agriculture to cooperate with willing landowners who desire to assist in the protection of endangered species, but who are understandably unwilling to do so at excessive cost to themselves.

Another hazard to endangered species arises from those who would capture or kill them, for pleasure or profit. There is no way that the Congress can make it less pleasurable for a person to take an animal, but we can certainly make it less profitable for them to do so. (emphasis added)

119 Cong. Rec. H8-18 (daily ed. Sept. 18, 1973).

The fact that Congress considered the problems of takings and habitat modifications separately does not, of course, preclude the possibility of overlap between the two regulatory schemes. Indeed, Congress seemed to anticipate such overlap when it made the following statement, taken from the House Report:

"Take" is defined broadly. It includes *harassment*, whether intentional or not. This would allow for example, the Secretary to regulate or prohibit the activities of bird-

watchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young. (emphasis added)

On its face this statement implies that an action such as habitat modifications which do not result in the actual injuring or killing of wildlife may nonetheless constitute a taking ("where the effects of these activities *might* disturb birds . . ."). We think it noteworthy, however, that the statement is limited to acts of harassment. "Harass" is defined at 50 C.F.R. 17.3 as follows:

"Harass" in the definition of "take" in the Act means *an intentional or negligent act or omission* which creates *the likelihood of injury to wildlife* by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering. (emphasis added)

Under this definition two elements must be shown before a finding of harassment can be made: (1) likelihood of injury to wildlife, and (2) some degree of fault, either intentional or negligent. Because the definition contains an element of fault, it will not result in criminal liability for habitat modifications unless it is shown that the defendant knew or reasonably should have known that his actions would be likely to injure wildlife. Thus a private landowner who wishes to develop land that serves as habitat for an endangered species may do so if reasonable measures are taken to avoid injury to wildlife. The same is not true, however, of the definition of "harm." That definition adopts a strict liability standard which would impose criminal penalties on habitat modifications generally regardless of fault. Thus under the definition of "harm" a private landowner may be criminally liable for significant habitat modifications regardless of the reasonableness of his efforts to mitigate harm to individual wildlife.

An early version of the bill that became ESA specifically included "destruction, modification, or curtailment

of habitat or range" within the definition of "take" but this was deleted from the final act. S. 1983, 93d Cong., 1st Sess. § 3(6)(A)(1973). Such deletions generally militate against a conclusion that Congress intended a result that it expressly declined to enact. *See Gulf Ol Corp. v Copp Paving Co.*, 419 U.S. 186 (1974). Accordingly, the Service's definition of "harm" should be clarified so that only those habitat modifications that result in the actual killing or injuring of wildlife will be subject to Section 9 criminal penalties.

D. Case Law

The limited case law interpreting the definition of "harm" indicates judicial confusion over the proper scope of the term. The Supreme Court mentioned the definition of "harm" in *TVA v. Hill*, 437 U.S. 153 (1978), [page 29,492] but did not clarify its meaning. It said in regard to the Tellico Dam situation, "[w]e do not understand how TVA intends to operate Tellico Dam without 'harming' the sail darter." 437 U.S. at 184 n. 30. We interpret the court's statement only to apply to the situation where an action would both degrade habitat and kill individual fish.[2] Such an interpretation is consistent with the approach adopted in this memorandum.

Only two cases have thus far interpreted the concept of "harm". In *Sierra Club v. Froehlke*, 534 F.2d 1289 (8th Cir. 1976), the Sierra Club sought to enjoin construction of a proposed dam alleging, *inter alia*, a violation of Section 9 of the Endangered Species Act. In a brief discussion, of limited, if any, assistance on the habitat modifica-

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[2] The Supreme Court in *TVA v. Hill* recited the findings of the district court that construction of Tellico Dam "would make it highly probable that snail darter eggs would smother . . ." and that "[the snail darter's] primary source of food, snails, would probably not survive." 437 U.S. at 165 N. 16. We assume that the Supreme Court expected the destruction of the species' primary food source to result in the killing of individual fish.

tion question, the court rejected plaintiffs' taking allegation, noting that a violation of Section 9 "rests upon the asserted ground that the erection of the dam is a 'clear attempt to harass or harm' the Indiana bat." 534 F.2d at 1304. The court's statement would seem to imply that a showing of specific intent to harass or harm is necessary to prove a taking a position inconsistent with the strict liability prohibitions established by Sections 9 and 11 and the present regulatory definition. Significantly, however, *Froehlke* was decided prior to promulgation of the "harm" definition, 44 Fed. Reg. 44415 (September 26, 1975), and the court therefore lacked the benefit of an agency interpretation.[3]

The second case interpreting the definition of "harm" is *Palila v. Hawaii Department of Land and Natural Resources*, 471 F. Supp. 965 (D. Haw. 1979), *aff'd*, No. 79-4636 (9th Cir. Feb. 9, 1981). This case did, on its face, direct its attention to habitat modification. In *Palila*, Section 9 was invoked by the Sierra Club to prevent the State of Hawaii's wildlife agency from allowing feral goats and sheep to roam in the critical habitat of the Palila, an endangered bird species. The plaintiffs alleged that because the state had allowed the destruction of forest vegetation which provides the Palila's food, shelter and nest sites, a taking had occurred even though no killing or injuring of individual Palilas was demonstrated. The district court interpreted the Service's definition as follows:

"Take" is defined in the Act to include "harm" which in turn is defined in regulations propounded by the Secretary of the Interior to include "significant environmental modification or degradation" *which actually injures or kills wildlife*. (emphasis added)

---

[3] The district court opinion in *Froehlke* was issued on March 19, 1975. The briefs in the court of appeals case were submitted to the court on September 10, 1975. Two weeks after the briefs were submitted to the court of appeals, the Fish and Wildlife Service issued its endangered species regulations defining the concept of harm. 44 Fed. Reg. 44415 (September 26, 1975).

471 F. Supp. at 995.[4] In a brief opinion, the Ninth Circuit Court of Appeals affirmed the district court's decision in *Palila*. The court's discussion of the taking issue demonstrates fundamental confusion over the distinction between habitat modifications and takings. On the basis of the FWS definition of harm, the Ninth Circuit concluded that a taking had occurred. Slip op. at 287. The court's discussion of its finding strongly suggests that it confused the taking prohibition of Section 9 with the habitat modification provisions of Section 7. The court rested its conclusion on the fact that "it was shown that the Palila was endangered by the activity." *Id.* Citing *TVA v. Hill, supra*. the court noted its belief that its conclusion was consistent with the Act's legislative history which showed "that Congress was informed that the greatest threat to endangered species is the destruction of their natural habitat." *Id.*

As the result of the FWS overly broad definition of "harm", the Ninth Circuit decision in *Palila* erroneously supports the view that habitat modifications alone may constitute "harm." The implications of such a decision are far-reaching. The discussion set forth above indicates that the present definition of "harm," as interpreted by the

---

[4] On its face this interpretation is in accord with the approach taken in this memorandum. The difficulty with *Palila* is that the standard was misapplied to the facts of the case. The district court, in a footnote, acknowledged that available estimates showed the Palila population to have actually increased since the onset of the state's grazing program, yet speculated that those estimates may have been "deceptively high" and went on to conclude that a taking had occurred. 471 F. Supp. at 988 n.2. Accordingly, the district court's recital of the proper rule notwithstanding, *Palila* can be read as holding that habitat modification alone may constitute "harm." Furthermore, the issue of whether the Service's definition of "harm" exceeds statutory authority was neither briefed by the parties nor addressed by the court in *Palila*. Under the rule of *Webster v. Fall*, 266 U.S. 507, 511 (1935), questions not brought to a court's attention "are not to be considered as having been so decided as to constitute precedents".

Court of Appeals in *Palila*, exceeds the statutory authority conferred by Section 9 of the Act. Accordingly, we recommend that the Service clarify its definition to prevent the result reached in *Palila*.

Conclusion

In view of the foregoing discussion, we recommend that the Service's definition of "harm" at 50 CFR 17.3 be modified to read as follows:

"Harm" in the definition of "take" in the Act means an act or omission which actually injures or kills wildlife.

J. Roy Spradley, Jr.

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[Page 54,748]

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Final Redefinition of "Harm"

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: This final rule is a redefinition of the Service regulation defining "harm" under section 9 of the Endangered Species Act, 50 CFR 17.3. "Harm" is redefined to mean any action, including habitat modification, which actually kills or injures wildlife, rather than the present interpretation which might be read to include habitat modification or degradation alone without further proof of death or injury. Habitat modification as injury would only be covered by the new definition if it significantly impaired essential behavioral patterns of a listed species.

DATE: This rule becomes effective November 4, 1981.

ADDRESSES: Questions concerning this rule may be addressed to the Director [OES], U.S. Fish and Wildlife Service, Department of the Interior, Washington, D.C. 20240. Comments and materials relating to the action are available by appointment for public inspection during normal business hours at the Service's Office of Endangered Species, Suite 500, 1000 N. Glebe Road, Arlington, Virginia.

FOR FURTHER INFORMATION CONTACT: Mr. John L. Spinks, Jr., Chief, Office of Endangered Species, U.S. Fish and Wildlife Service, U.S. Department of the Interior, Washington, D.C. 20240, (703) 235-2771.

SUPPLEMENTARY INFORMATION: On June 2, 1981, the Fish and Wildlife Service proposed to amend the definition of "harm" in its regulations under the Endangered Species Act at 50 CFR 17.3. 46 FR 29490 (June 2, 1981). That proposed rule invited public comment for a period of 60 days, ending on August 3, 1981. The notice proposed the redefinition on the grounds that the existing language could be construed as prohibiting the modification of habitat even where there was no injury to the listed endangered or threatened wildlife. The Office of the Solicitor, in a memorandum to the Director of the Fish and Wildlife Service, concluded that such application of Section 9 would go beyond the intent of Congress in the Act. Accordingly, the Associate Solicitor recommended that the definition be changed to obviate any such erroneous application. In addition, the issue had begun to appear in judicial opinions and the Service desired to clarify the definition to avoid any result which would be inconsistent with the Act. In proposing a redefinition, however, the Service did not intend to imply that significant habitat destruction which could be shown to injure protected wildlife through the impairment of its essential behavioral patterns was not subject to the Act. This misperception has been eliminated in the final rule.

The Service received numerous public comments from a variety of parties. Of the 328 comments received, 66 favored the redefinition as proposed, and 262 opposed the proposed redefinition. Approximately 30 of the comments received made substantive or analytical comments of varying degrees; the remaining letters simply voiced support or opposition for the proposed redefinition. The comments in support of the redefinition basically relied on the points contained in the Associate Solicitor's memo-

randum attached to the rulemaking. Some of the comments in favor of the redefinition, however, viewed the action as limiting "harm" to direct physical injury to an individual member of the wildlife species. This was not the intent of the Service and the final redefinition addresses that perception. The purpose of the redefinition was to preclude claims of a Section 9 taking for habitat modification alone without any attendant death or injury of the protected wildlife. Death or injury, however, may be caused by impairment of essential behavioral patterns which can have significant and permanent effects on a listed species. [Page 54,749] Many commenters suggested that the word "actually" be reinserted in the definition to bulwark the need for proven injury to a species due to a party's actions. This has been done.

Congress made its intent to protect species and their habitat very clear. It did not, however, express any intention to protect habitat under section 9 where there was no appurtenant showing of death or injury to a protected species. This was made clear in the preamble to the original definition of harm:

> "Harm" covers actions . . . which actually (as opposed to potentially), cause injury . . .
>
> By moving the concept of environmental degradation to the definition of "harm", potential restrictions on environmental modifications are expressly limited to those actions causing actual death or injury to a protected species of fish or wildlife. The actual consequences of such an action upon a listed species is paramount. 40 FR 44412, 44413 (September 26, 1975)

Thus, to the extent that comments recommended further limitations, they misconstrued the intent of the rulemaking. In the opinion of the Service, the final redefinition sufficiently clarifies the restraints of section 9 so as to avoid injury to protected wildlife due to significant

habitat modification, while at the same time precluding a taking where no actual injury is shown.

Similarly, parties who opposed the redefinition perceived it as eliminating any protection against injury due to significant habitat modification. Again, this was not the intent of the Service in the redefinition. This concern, of course, is unfounded because section 9's threshold does focus on individual members of a protected species. In addition, the final redefinition makes it clear that the concept is not so limited.

The comments raised a number of specific objections to the proposed redefinition. The predominant comments are addressed individually below.

Comment—A number of comments stated that the proposed redefinition was superfluous because it defined "harm" using terms that were already in Congress' definition of "take."

Response—This comment fails to appreciate that Congress intended to create a definition of take which included all of the various ways of killing or injuring protected wildlife. Congress defined "take" as meaning to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect * * *". It is obvious that there is considerable overlap in many of these terms and it would be a fruitless and impractical exercise to attempt to define any one of these terms to the exclusion of the others so as to have no overlap of prohibited actions.

Comment—A number of comments challenged the ejusdem generis argument of the legal memorandum attached to the proposal, saying that the opinion's analysis of the Act on these grounds was erroneous.

Response—In the opinion of the Service, this comment fails to take the ejusdem generis argument in context. The purpose of the rulemaking was to make it clear that an *actual* injury to a listed species must be found for there to be a taking under section 9. The issue under examination was whether habitat modification alone, without the

kind of injury or harm envisioned in the definition of "take", was a violation of section 9. The opinion concluded that it was not and no substantive comments were received to the contrary. "Harm" was being examined to see if it could be read as meaning habitat modification alone—a meaning that an early version of S. 1983, 93d Cong. 1st Sess. Section 3(b)(A) might have given it. In view of the specificity contained in the definition of take finally enacted, it was concluded that no such meaning could be given to harm.

Comment—The principal objection raised by both substantive and nonsubstantive comments was that the redefinition was inconsistent with the intent of Congress and with the findings of Congress under the Act that habitat destruction is one of the two major causes of extinction.

Response—This view was partly due to public misperception of the purpose and scope of the proposal. The Service agrees that where there is no legislative history specifically on point for a given section, the overall intent of Congress should control. Nonetheless, this rule of construction cannot be used to convert section 9 into a habitat protection provision; as other comments pointed out, that is the purpose of sections 5 and 7 of the Act. Of course, the Service recognizes that in some cases, there is critical need of protected wildlife for specific habitat. Significant modification or destruction of such habitat, where an actual injury occurs, including impairment of essential behavioral patterns, will still be viewed as being subject to section 9 of the Act.

Comment—Many comments also cited legislative history which showed that Congress intended the term "take" to be construed very broadly.

Response—While recognizing the Congressional intent, the Service feels that the legislative history cannot be read to prohibit habitat modification under section 9 without actual injury. The examples given, in each instance, were in the context of injury to a species and not to habitat.

As the final rule makes clear, where the habitat modification results in injury, the action is subject to section 9.

Comment—A few comments disagreed with the Service's finding of ambiguity in the present definition and contended that it also requires death or injury.

Response—The Service recognizes that the existing definition can be read this way and, indeed, that was the Service's original intent in 1975. Nonetheless, to the extent that there is a latent ambiguity which implies criminal and civil liability not intended by Congress, the Service feels it appropriate to clarify the definition.

Comment—The issue of section 7/section 9 conflict was also raised a number of times, the comments disagreeing that the existing definition might render section 7 superfluous.

Response—Again, this comment is only valid to the extent that the redefinition is viewed as eliminating the concept of injury by habitat modification. If habitat modification alone were covered by section 9, it also could be argued that much of section 7 would be theoretically superfluous. This was the context of the section 7/section 9 discussion and the majority of the comments fail to realize this. This preamble and the wording of the final definition should obviate this misperception.

Comment—Many comments differed strongly with the legal memorandum's discussion of *Palila* v. *Hawaii Department of Land and Natural Resources,* 471 F.Supp. 965 (D. Haw. 1979), *aff'd,* 639 F.2d 495 (9th Cir. 1961), and some even suggested that the Service's action was unconstitutional. The principal objection was that *Palila* was correctly decided and that the Service redefinition was intended to avoid the result of that case.

Response—The Solicitor's Office opinion disagrees. The *Palila* decisions can be read to incorrectly *imply* that under the Services definition of "harm" a taking may occur from habitat modification alone. The question of injury to a population is, of course, one of fact, but, the Solicitor's Office was concerned that the District Court miscon-

strued the biological evidence presented at trial and substituted its own judgment in finding injury to the Palila. To the extent that courts have now started to discuss and rely upon the Service's definition of harm, it is important to clarify what the Service intended the definition to mean. Although the legal memorandum [Page 54,750] attached to the rulemaking did propose a clarification "to prevent the result reached in *Palila*". 46 FR 29492, the "result" referred to was the implication in the opinions that section 9 might apply to habitat modification absent death or injury.

Comment—At least one substantive comment apparently argues that habitat modification alone was intended by Congress to be a taking prohibited by section 9. The precise objection of the comment is unclear, however, because the examples and discussion in the comment continually refer to the injury and harmful effects on species which can be caused by habitat destruction.

Response—To the extent that the comment contends that habitat modification alone is a taking, it is without support in the Act or legislative history. The comment provides no substantive support and, indeed, is at odds with the majority of comments which concede that such habitat modification or degradation must be coupled with death or injury to a listed species. As previously stated, the Service agrees with the many other comments which recognized the need for actual injury. To the extent that this comment intended to concede the need for injury, the final definition addresses its concerns.

The bulk of criticism of the proposed redefinition was aimed at the legal opinion and questioned its support for a redefinition which eliminated habitat modification as a potential source of injury. As a general matter, these complaints are inapposite since this was never the intention of the redefinition. In the Service's opinion, the proposed redefinition would still have encompassed this type of injury. Nonetheless, the final redefinition eliminates this

problem and either answers or makes moot all of the legal questions raised in the comments.

Although some of the comments specifically argued that habitat modification alone is a prohibited taking under section 9, in the opinion of the Service, Congress expressed no such intent.

The final definition adds the word "actually" before the words "kills or injures" in response to comments requesting this addition to clarify that a standard of actual, adverse effects applies to section 9 takings. In addition, the phrase "or omission" was deleted since the Service feels that "act" is inclusive of either commissions or omissions which would be prohibited by section 9.

In response to the broad misperception of the intent of the rule, an additional sentence has been added which is similar to the original definition's language. This additional language makes it clear that habitat modification or degradation, standing alone, is not a taking pursuant to section 9. To be subject to section 9, the modification or degradation must be *significant,* must *significantly impair essential* behavioral patterns, and must result in *actual* injury to a protected wildlife species. The word "impair" was substituted for "disrupt" to limit harm to situations where a behavioral pattern was adversely affected and not simply disturbed on a temporary basis with no consequent injury to the protected species. The other terms are retained from the original definition to provide the standards by which such takings are to be judged.

National Environmental Policy Act

An environmental assessment has been prepared in conjunction with this redefinition. Based on the record compiled in this decisionmaking and the environmental assessment, the Assistant Secretary for Fish and Wildlife and Parks has determined that this is not a major Federal action which would significantly affect the quality of the human environment within the meaning of Section 102

(2)(C) of the National Environmental Policy Act. 42 U.S.C. 4332(2)(C).

Note.—The Department of the Interior has determined that this is not a major rule and does not require preparation of a regulatory analysis under Executive Order 12291. The Department has also determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act. These determinations are discussed in more detail in a Determination of Effects which has been prepared by the U.S. Fish and Wildlife Service.

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

Accordingly, the definition of "harm" in 50 CFR 17.3 is revised to read as follows:

§ 17.3 Definitions.

* * * * *

"Harm" in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

* * * * *

Dated: October 1, 1981.

G. Ray Arnett,

Assistant Secretary for Fish and Wildlife and Parks.

SUPREME COURT OF THE UNITED STATES

No. 94-859

BRUCE BABBITT, Secretary of the Interior, ET AL.,
PETITIONERS

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, ET AL.

ORDER ALLOWING CERTIORARI

Filed January 6, 1995

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

January 6, 1995

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No. 94-859

In the Supreme Court of the United States

OCTOBER TERM, 1994

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.,
PETITIONERS

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR
A GREAT OREGON, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Under Section 9(a)(1) of the Endangered Species Act of 1973, 16 U.S.C. 1538(a)(1), and implementing regulations, it is unlawful for any person to "take" an endangered or threatened species, except for certain "takes" that are incidental to otherwise lawful activities and authorized by the Secretary of the Interior under conditions designed to minimize and mitigate the impact on the species, 16 U.S.C. 1536(b)(4), 1539(a)(1). The Act defines the term "take" to include "harm." 16 U.S.C. 1532(19). The question presented is:

Whether the regulation promulgated by the Secretary in 1975 and 1981 that defines "harm" to include "significant habitat modification or degradation" that "actually kills or injures wildlife," 50 C.F.R. 17.3, is invalid on its face.

PARTIES TO THE PROCEEDINGS

The petitioners are Bruce Babbitt, in his official capacity as the Secretary of the Interior, and Mollie H. Beattie, in her official capacity as Director of the United States Fish and Wildlife Service, an agency within the Department of the Interior. The respondents are Sweet Home Chapter of Communities for a Great Oregon, Betty F. Orem, Erickson Busheling, Inc., Southeastern Lumber Manufacturers Association, Inc., Southern Timber Purchasers Council, Ridgetree Logging Company, Shotpouch Logging Company, Jean Reynolds, Emmy G. Birkenfeld, and Pat McCollum.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-859

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The March 11, 1994, opinion of the court of appeals issued after granting respondents' petition for rehearing (Pet. App. 1a-41a) is reported at 17 F.3d 1463. The August 12, 1994, statements accompanying the court of appeals' denial of petitioners' petition for rehearing and suggestion of rehearing en banc (Pet. App. 89a-99a) are reported at 30 F.3d 190. The July 23, 1993, initial opinion of the court of appeals (Pet. App. 42a-72a) is reported at 1 F.3d 1. The opinion of the district court (Pet. App. 73a-88a) is reported at 806 F. Supp. 279.

JURISDICTION

The court of appeals entered its initial judgment on July 23, 1993. The court of appeals thereafter granted respondents' petition for rehearing, and on March 11, 1994, it entered a new judgment that differed from its earlier judgment. Petitioners then sought rehearing of that new judgment, and the court of appeals denied that petition for rehearing on August 12, 1994. Pet. App. 89a-99a. The petition for a writ of certiorari was filed on November 10, 1994, and was granted on January 6, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 9(a)(1) of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1538(a)(1), provides in relevant part:

> Except as provided in sections 6(g)(2) and 10 of this Act, with respect to any endangered species of fish or wildlife listed pursuant to section 4 of this Act it is unlawful for any person subject to the jurisdiction of the United States to—
>
> * * * * *
>
> (B) take any such species within the United States or the territorial sea of the United States;
>
> * * * * *
>
> (G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 4 of this Act and promulgated by the Secretary pursuant to authority provided by this Act.

2. Section 3(19) of the ESA, 16 U.S.C. 1532(19) provides:

> For the purposes of this Act—

> The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

Other pertinent provisions of the ESA (§§ 2, 4, 7, 9, 10, 16 U.S.C. 1531, 1533, 1536, 1538, 1539) are reprinted at App., *infra*, 1a-19a.

3. The Secretary of the Interior's regulation defining "harm" for purposes of the ESA, 50 C.F.R. 17.3, provides:

> *Harm* in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

STATEMENT

The Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*, makes it unlawful for any person to "take" a species of fish or wildlife that is listed as endangered or threatened. 16 U.S.C. 1538(a)(1). The ESA defines the term "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. 1532(19). A regulation issued by the Secretary of the Interior in 1975 and 1981 in turn defines "harm" to mean an act "includ[ing] significant habitat modification or degradation" that "actually kills or injures wildlife" by "significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. 17.3. The district court sustained the validity of 50 C.F.R. 17.3. The court of appeals reversed and held the

regulation facially invalid insofar as it defines "harm" to embrace any form of habitat modification or degradation.[1]

1. Congress enacted the Endangered Species Act in 1973 in response to increasing concern about the extent to which "various species of fish, wildlife, and plants" had been rendered extinct "as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. 1531(a)(1). The purposes of the ESA include providing "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. 1531(b).

a. Under the ESA, the Secretary determines the wildlife species that are "endangered" or "threatened" within the meaning of the Act and maintains a list of such species.[2] 16 U.S.C. 1533(a). In deciding whether to list a species, the Secretary must consider, *inter alia*, "the present or threatened destruction, modification, or curtailment of its habitat or range." 16 U.S.C. 1533(a)(1)(A).

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[1] Responsibility for administration of the ESA is divided between the Fish and Wildlife Service (FWS) in the Department of the Interior and the National Marine Fisheries Service (NMFS), in the Department of Commerce. See 16 U.S.C. 1532(15); 50 C.F.R. 402.01(b); see also 50 C.F.R. 17.11, 17.12, 222.23(a) and 227.4 (listing species within NMFS and FWS jurisdiction). Because this action was brought against the Secretary of the Interior and the Director of FWS and was prompted by respondents' challenge to protection afforded to two species of birds within the jurisdiction of FWS, we shall refer in this brief only to the responsibilities of the Secretary of the Interior and FWS.

[2] "Endangered species" means any species (other than certain insect species) "which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. 1532(6). "Threatened species" means "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. 1532(20). Endangered and threatened species are referred to collectively as "listed species."

When a fish or wildlife species is listed as endangered, it is protected by Section 9(a)(1) of the ESA.[3] Section 9(a)(1)(B) makes it unlawful for "any person" (which includes governmental entities, see 16 U.S.C. 1532(13)) to "take" an endangered species. 16 U.S.C. 1538(a)(1)(B). The prohibition may be enforced through suits for injunctive relief, 16 U.S.C. 1540(e)(6), as well as civil and criminal penalties, 16 U.S.C. 1540(a) and (b). By regulation, the Section 9 "take" prohibition also applies generally to species that are listed as threatened.[4]

The ESA defines the term "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. 1532(19). As part of its initial set of programmatic regulations implementing the ESA, FWS promulgated a regulation in 1975 interpreting the term "harm" for purposes of the ESA. As

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[3] "Fish or wildlife" is defined in the ESA as "any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof." 16 U.S.C. 1532(8). The term "plant" is separately defined, see 16 U.S.C. 1532(14). The "take" prohibition in Section 9(a)(1)(B) does not apply to endangered species of plants, which are instead protected by Section 9(a)(2) of the Act, 16 U.S.C. 1538(a)(2). See note 24, *infra*.

[4] Under Section 4(d) of the Act, 16 U.S.C. 1533(d), the Secretary may, by regulation, prohibit with respect to threatened species any act prohibited under 16 U.S.C. 1538(a)(1). The Secretary has extended the "take" prohibition in 16 U.S.C. 1538(a)(1)(B) to threatened fish and wildlife species. See 50 C.F.R. 17.31(a), 17.21(c)(1). Thus, the "take" prohibition applies to all listed species of fish or wildlife except where special rules applicable to particular threatened species otherwise provide. See 50 C.F.R. 17.40-17.48. On February 17, 1995, the Secretary published regulations under Section 4(d) that address the application of the "take" prohibition to the northern spotted owl (a threatened species). 60 Fed. Reg. 9484.

this Court noted in *TVA* v. *Hill*, 437 U.S. 153, 184-185 n.30 (1978), the 1975 regulation defined "harm" to mean an act that "actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavioral patterns, which include, but are not limited to, breeding, feeding or sheltering," and which include "significant environmental modification or degradation which has such effects." 50 C.F.R. 17.3; see 40 Fed. Reg. 44,412, 44,416 (1975) (J.A. 49, 51). The preamble to the 1975 regulation explained that the regulation represented a "reasonable response to the habitat needs of listed species," which Congress had specifically acknowledged in the "[p]urposes" section of the ESA, 16 U.S.C. 1631; see 40 Fed. Reg. 44,413 (J.A. 50). The preamble further noted that the environmental degradation encompassed within the regulatory definition of "harm" was:

> expressly limited to those actions causing actual death or injury to a protected species of fish or wildlife. The actual consequences of such an action upon a listed species is paramount.

40 Fed. Reg. 44,413 (J.A. 50).

The Secretary revised the "harm" regulation in 1981 because of concerns that the 1975 regulatory language was susceptible to an interpretation that would bar habitat modification even where there would be no resulting injury to listed fish or wildlife, contrary to the intent of both the Secretary and Congress. See 46 Fed. Reg. 54,748 (1981) (J.A. 65). The Secretary modified the regulation to make it consistent with the original intent that a Section 9 "take" violation does not arise out of "habitat modification alone without any attendant death or injury of the protected wildlife." 46 Fed. Reg. 54,748-54,749 (1981) (J.A. 66-68). At the same time, however, the Secretary reaffirmed that "harm" is not limited "to direct physical injury to an individual member

of the wildlife species," and that in redefining the term, he "did not intend to imply that significant habitat destruction which could be shown to injure protected wildlife through the impairment of its essential behavioral patterns was not subject to the Act." 46 Fed. Reg. 54,748 (J.A. 66-67). The "harm" regulation as revised in 1981 provides:

> *Harm* in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 C.F.R. 17.3; see 46 Fed. Reg. 54,748 (J.A. 65).

b. In addition to the Section 9 "take" prohibition, the ESA includes other methods of protecting listed species. Section 7(a)(2) provides that each federal agency shall, in consultation with and with the assistance of the Secretary,

> insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary * * * to be critical,[5] unless

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[5] "Critical habitat" has a specific and limited meaning for purposes of the ESA. Section 4 empowers the Secretary to designate "critical" habitat for listed species. 16 U.S.C. 1533(a)(3), (b)(2) and (b)(6)(C). "Critical habitat" is defined by the Act to mean:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

> such agency has been granted an exemption for such action * * * pursuant to subsection (h).

16 U.S.C. 1536(a)(2). This obligation to ensure against "jeopardizing" a species' continued existence or destroying or adversely modifying its "critical" habitat applies to a federal agency's issuance of licenses and permits to non-federal parties (for activities on either public or private lands), as well as actions undertaken by the agency itself. 16 U.S.C. 1536(a)(3); see generally 16 U.S.C. 1536(c) (directing federal agency to prepare biological assessment to determine whether listed species is "likely to be affected" by proposed action); 16 U.S.C. 1536(b) (provisions for Secretary to issue biological opinion to action agency).

The ESA also contains several provisions, in Sections 4, 5 and 7, that are aimed not merely at preventing extinction of listed species, but also at their conservation. For purposes of the ESA, "conservation" means "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. 1532(3). Available conservation meas-

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> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. 1532(5)(A). In appropriate cases, designating unoccupied potential habitat for listed species can play a role in the recovery of the species by providing for "natural range expansion into adjacent suitable habitat." 49 Fed. Reg. 38,904 (1984). However, "[e]xcept in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied" by listed species. 16 U.S.C. 1532(5)(C). Thus, designation of critical habitat may add protections for a listed species against federal government actions that are likely to take place on some suitable, but unoccupied, habitat.

ures include, but are not limited to, "all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking." 16 U.S.C. 1532(3).

The conservation provisions of the ESA are intended to achieve the eventual removal of the species from the endangered and threatened lists. To that end, Section 4(f) authorizes the Secretary to develop and implement recovery plans to promote the conservation of species. 16 U.S.C. 1533(f). Section 5 empowers the Secretary to utilize land acquisition and authority under other wildlife protection statutes to acquire land to implement a program to conserve endangered and threatened species. 16 U.S.C. 1534. And Section 7(a)(1) requires federal agencies, in consultation with and with the assistance of the Secretary, to "utilize their authorities in furtherance of the purposes of [the Act] by carrying out programs for the conservation of endangered species and threatened species." 16 U.S.C. 1536(a)(1).

c. The "take" prohibition in Section 9 and the "jeopardy" and "critical" habitat restrictions in Section 7 are not absolute—the Secretary may permit "incidental takings" in some instances that meet detailed criteria enacted by Congress in 1982.[6] Specifically, by amendments to Sections 7 and 10, Congress authorized the Secretary to permit takings that would otherwise be prohibited under Section 9(a)(1)(B),

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[6] Even prior to 1982, Sections 7 and 9 were not absolute. In 1978, Congress had established a procedure for exempting projects from the Section 7(a)(2) prohibitions, see 16 U.S.C. 1536(e)-(n), and from liability for violation of the Section 9 "take" prohibition, see 16 U.S.C. 1536(*o*) (Supp. III 1979). Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 3, 92 Stat. 3753-3759. See page 32, *infra*.

"if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, § 6(1), 96 Stat. 1422 (codified at 16 U.S.C. 1539(a)(1)(B)); see also § 4(a)(2), 96 Stat. 1418 (codified at 16 U.S.C. 1536(b)(4)).

Section 10(a)(2)(A) provides for the issuance of an incidental take permit to applicants (including nonfederal entities and private parties) who are not subject to the jeopardy and critical habitat restrictions (and related consultation requirement) applicable to federal agencies under Section 7(a)(2). Congress conditioned issuance of a Section 10 incidental take permit, however, on the assumption by the applicant of certain duties. The ESA states that "[n]o permit may be issued by the Secretary" authorizing an incidental taking unless the applicant therefor submits to the Secretary

> a conservation plan that specifies—
>
> (i) the impact which will likely result from such taking;
>
> (ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;
>
> (iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and
>
> (iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

16 U.S.C. 1539(a)(2)(A). The Secretary will issue the permit if he finds, *inter alia*, that the taking will be incidental, that the applicant will "to the maximum extent practicable, minimize and mitigate the impacts of such taking," that "the applicant will ensure that adequate funding for the plan will be provided," that "the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the

wild," and that the applicant will meet "such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan." 16 U.S.C. 1539(a)(2)(B) and (A)(iv).

Congress provided a somewhat different mechanism for authorizing "incidental takes" resulting from a project subject to the Section 7(a)(2) jeopardy prohibition and critical habitat restrictions. The biological opinion that FWS prepares during the formal Section 7 consultation process includes what is known as an "incidental take statement." That statement must identify the impact of any take that is anticipated to occur incidental to the proposed federal action, as well as the "reasonable and prudent measures" that the Secretary considers "necessary or appropriate to minimize such impact"; it also sets forth the "terms and conditions * * * that must be complied with by the Federal agency or [permit or license] applicant (if any) or both to implement the measures specified." 16 U.S.C. 1536(b)(4). Any taking that is in compliance with those terms and conditions is not considered a prohibited taking of the species in violation of Section 9. 16 U.S.C. 1536(*o*)(2).

2. Respondents are individuals and organizations in the Pacific Northwest and Southeast who are engaged in, or depend upon, timber harvesting. They allege that they are affected by the Secretary's "harm" regulation because of its application to the northern spotted owl, which was listed as a threatened species in 1990, 55 Fed. Reg. 26,114, and the red-cockaded woodpecker, which was listed as an endangered species in 1970, 50 C.F.R. 17.11(h). J.A. 17-23.[7]

Respondents brought this action as a facial challenge to the regulation, and did not challenge it as applied to any of their

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[7] The red-cockaded woodpecker was listed pursuant to the Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275, a predecessor to the Endangered Species Act.

own actions in relation to the listed birds.[8] On cross-motions for summary judgment, the district court upheld the validity of the "harm" regulation under step one of the analytical framework set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984), concluding that the "language, structure and history of the ESA reveal that Congress intended an expansive interpretation of the word 'take,' an interpretation that encompasses habitat modification." Pet. App. 82a-83a. The court further stated that even if it were to find the ESA "silent or ambiguous" on the issue, it would uphold the Secretary's regulation under step two of the *Chevron* analysis as a reasonable interpretation of the Act. *Id.* at 83a. The district court also held that the regulatory definition of "harm" was not void for vagueness. *Id.* at 83a-85a.

3. a. The court of appeals initially affirmed the district court's judgment, with the panel divided on the question of the validity of the "harm" regulation. Pet. App. 42a-72a. The majority opinion included a *per curiam* ruling that the "harm" regulation does not violate the ESA. *Id.* at 46a. Chief Judge Mikva wrote a concurring opinion, reasoning that the "harm" regulation represents a reasonable interpretation of the Act that is entitled to deference under *Chevron*. *Id.* at 59a-66a. Judge Williams wrote a concurring opinion agreeing that the regulation complies with the ESA. He reasoned that the 1982 amendments authorizing incidental taking permits "support the inference that the ESA otherwise forbids some such incidental takings, including some habitat modifications." *Id.* at 67a. Judge Sentelle dissented. *Id.* at 68a-72a.

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[8] Respondents also challenged the facial validity of a regulation that extends certain protections to threatened species, 50 C.F.R. 17.31(a). The courts below sustained that regulation (see Pet. App. 85a-88a; *id.* at 2a, 51a-58a), and no party sought further review of that issue.

b. The panel granted respondents' petition for rehearing and, on March 11, 1994, in another divided decision, reversed the district court's judgment with respect to the validity of the "harm" regulation."[9] Pet. App. 1a-41a. Judge Sentelle filed a concurring opinion (*id.* at 25a-26a) and Chief Judge Mikva filed a dissenting opinion (*id.* at 27a-41a).

The court of appeals concluded that the "harm" regulation was "neither clearly authorized by Congress nor a 'reasonable interpretation' of the statute," and that no later action of Congress "supplied the missing authority." Pet. App. 3a, citing *Chevron*, 467 U.S. at 842-843, 844. The court acknowledged that "[t]he potential breadth of the word 'harm' is indisputable," Pet. App. 3a, but nonetheless held that the Secretary's definition of the term is too broad. In the court's view, the other words in the statutory definition ("harass, * * * pursue, hunt, shoot, wound, kill, trap, capture, or collect") all "contemplate the perpetrator's direct application of force against the animal taken"—*e.g.*, "A hit B." *Id.* at 4a. The court reasoned that it should therefore apply the maxim "*noscitur a sociis*" (that a word is known by the company it keeps) and read the term "harm" as limited to direct application of force against animals, and to exclude any habitat modification. *Id.* at 5a-7a.

The court viewed the "structure and history of the Act" as confirming its reading. Pet. App. 7a. Thus, it read the "harm" regulation to have "transposed to the private anti-'take' provision" the duty of federal agencies under Section 7(a)(2) to ensure that actions are "not likely to jeopardize the continued existence" of a listed species or result in "'*the destruction or adverse modification of habitat* of such species which is determined * * * to be critical.'" Pet. App. 7a. The court

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[9] The court's original judgment is otherwise unaltered. Pet. App. 24a. Thus, the court of appeals adhered to its rulings that 50 C.F.R. 17.31 is valid and that the "harm" regulation is not void for vagueness.

found that result to be contrary to the legislative history of the ESA, which it read as assigning "the primary task of habitat preservation to the government." *Id.* at 8a. The court also noted that the bill ultimately enacted did not include language in one bill considered by the Senate committee that would have defined "take" to include "the destruction, modification, or curtailment of [a species'] habitat or range." *Id.* at 9a-10a. Finally, the court read the legislative history of the 1982 amendments' provision for incidental take permits as not referring to habitat modification, and therefore as not ratifying the Secretary's interpretation. *Id.* at 10a-24a.

In a concurring opinion, Judge Sentelle expressed the view that the language and structure of the ESA provided a sufficient basis for invalidating the "harm" regulation and that resort to the legislative history was unnecessary. Pet. App. 25a. He also reasoned that to define "harm" as the Secretary does would render superfluous the other words in the statutory definition of "take." *Ibid.*

Judge Mikva dissented. Pet App. 27a-41a. He first objected that the majority erroneously shifted the burden to the government agency to show that its interpretation is clearly authorized or reasonable, whereas, under *Chevron*, the burden is on those challenging governmental action to show either that Congress has directly spoken on the issue or that the agency's interpretation is unreasonable. *Id.* at 28a. In this case, Judge Mikva concluded that the Act is silent, or at best ambiguous, on the scope of the term "harm," so that the issue is whether the Secretary's interpretation of that term constitutes a permissible reading of the ESA. *Id.* at 29a. He concluded that it does, expressing the view that the majority's application of *noscitur a sociis* was fatally flawed because the "definition of 'take' does not conform to the paradigm of one broad word alongside many narrow ones." *Id.* at 30a.

Judge Mikva found additional support for the Secretary's interpretation in the purpose and legislative history of the

ESA, including the 1982 amendments. The amendments, he reasoned, demonstrate that Congress thought that the original Section 9 prohibition against "takings" included some "incidental takings," and that by "incidental takings" Congress clearly meant to include some habitat modification. Pet. App. 37a-39a.

c. Petitioners filed a petition for rehearing with suggestion of rehearing *en banc*, which the court denied on August 12, 1994. Pet. App. 89a-90a. Judge Williams, writing for the panel majority, issued a statement accompanying the order denying rehearing. In response to petitioners' contention that the court had ascribed an overly broad reading to the Secretary's "harm" regulation, the panel majority expressed the belief that omissions as well as affirmative acts are embraced by the regulation, and that enforcement of the regulation would reach habitat modification over vast tracts of land. *Id.* at 91a. The panel majority also reiterated its view that the "harm" regulation imposes on private parties responsibilities under Section 9 that are identical to those imposed on federal agencies under Section 7. *Id.* at 91a-94a. Finally, in response to petitioners' submission that its *Chevron* analysis was flawed and unclear, the panel majority announced that its invalidation of the regulation was based on step one of the *Chevron* analysis and that, in its view, the Act "manifests a clear determination by Congress" that the Section 9 "take" prohibition "should not reach habitat modifications * * * where there is no direct action by the defendant against any member of the species." Pet. App. 95a.

Four members of the court of appeals voted to grant rehearing en banc. Pet. App. 90a. Three of those judges—Judge Silberman, joined by Chief Judge Mikva and Judge Wald—filed a statement expressing the view that under a *Chevron* analysis, the interpretation of "harm" in the Secretary's regulation should be sustained. *Id.* at 98a-99a.

SUMMARY OF ARGUMENT

A. The Secretary of the Interior's interpretation of "harm" is based on a reasonable construction of the Endangered Species Act of 1973 (ESA). Defining "harm" to include habitat modification or degradation that actually kills or injures wildlife is consistent with the text and structure of the Act. The carefully tailored "harm" regulation does not apply to habitat modification or degradation generally. It is limited to such actions that actually kill or injure. The ordinary meaning of "harm" encompasses killing or injuring, whether by habitat modification or otherwise. The court of appeals' reliance on *noscitur a sociis* to invalidate the Secretary's interpretation was misplaced. Construing "harm" as extending the "take" definition to embrace all conduct that comes within the more particular words of the statute, such as "kill," gives effect to all the words in the statute so that none is superfluous. To sustain respondents' facial challenge to the regulation would be inconsistent with the object and structure of the Act as a whole.

B. From the outset, Congress intended the prohibition against the "taking" of endangered species in Section 9(a)(1)(B) to be interpreted broadly to include "every conceivable way in which a person can 'take'" wildlife. The Secretary's regulation has been in effect, with revision in 1981, since shortly after the ESA was enacted and warrants substantial deference. As early as 1978, this Court cited the "harm" regulation approvingly in *TVA* v. *Hill*, 437 U.S. 153, 185, emphasizing the regulation's inclusion of "significant environmental modification or degradation." Congress amended the ESA on the heels of *TVA* v. *Hill* to permit federal projects that obtain an exemption under Section 7 of the Act to be exempted from the Section 9 "take" prohibition, and any regulations promulgated thereunder (no doubt including the "harm" regulation in light of the virtually contemporaneous

TVA ruling). Congress's 1982 amendment of the ESA reinforced the validity of the "harm" regulation through the creation of the incidental take permit process. The text and history of that permit process leave no doubt that Congress, like the Secretary, interprets the Section 9 "take" prohibition to extend, in the absence of such a permit, to actions that cause a "take" by habitat modification.

C. Contrary to the court of appeals' interpretation, the Secretary's interpretation of "harm" does not impose on private parties the same obligations imposed on federal agencies by Section 7. The court's erroneous reasoning is based on its misunderatanding of "critical habitat" under the ESA and its failure to appreciate that various provisions of the ESA were designed to overlap to further the purposes of the Act. The court of appeals nonetheless invalidated the "harm" regulation on the basis of imagined applications that were not before it. Application of the standard for determining whether a regulation is valid on its face (*i.e.*, whether there are any circumstances under which the regulation would be valid) demonstrates that the Secretary's interpretation should be sustained.

ARGUMENT

THE SECRETARY'S INTERPRETATION OF "HARM" IS BASED ON A REASONABLE CONSTRUCTION OF THE ENDANGERED SPECIES ACT AND THEREFORE SHOULD BE SUSTAINED

"[T]he Endangered Species Act of 1973 represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *TVA* v. *Hill*, 437 U.S. 153, 180 (1978). "The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost." *Id.* at 184. It is widely recognized that loss or degradation of habitat most often poses

the greatest risk to endangered and threatened species. *Id.* at 179; Edward O. Wilson, *The Diversity of Life* 253, 346 (Belknap Press, Harv. Univ. Press 1992); Daniel J. Rohlf, *The Endangered Species Act: A Guide to its Protection and Implementation* 11 (Stan. Envtl. Law Soc'y 1989). When Congress enacted the ESA in 1973, it concluded that habitat destruction played a central role in the rising number of species threatened with extinction. Thus, one of the stated purposes of the ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. 1531(b).

The Secretary of the Interior is charged with responsibility for implementing and enforcing the ESA. See 16 U.S.C. 1533. The Secretary, through the Director of the Fish and Wildlife Service, promulgated a regulation, 50 C.F.R. 17.3, to define "harm," which is one of the words used in the ESA to define "take." 16 U.S.C. 1532(19). The term "take" is significant under the ESA both because Section 9 makes it unlawful for "any person" to "take" an endangered species, and because Sections 7 and 10 establish procedures for permitting a "take" that is merely incidental to an otherwise lawful activity. The Secretary's regulation defines "harm" to mean an act that "actually kills or injures wildlife," including "significant habitat modification or degradation" that causes those consequences by "significantly impairing essential behavioral patterns" of the wildlife, such as "breeding, feeding and sheltering." 50 C.F.R. 17.3.

When a court reviews an agency's construction of a statute that it administers, the two-step inquiry prescribed by this Court in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984), governs the analysis. At step one, the reviewing court determines "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If the court determines that Congress unambiguously expressed an intent on the precise

question, the court must give effect to that intent. *Id.* at 843. If the statute is silent or ambiguous with respect to the issue, however, the court proceeds to step two and determines whether the agency's interpretation is based on a permissible construction of the statute. *Id.* at 843-845. "If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, [the Court] give[s] the administrator's judgment 'controlling weight.'" *NationsBank* v. *Variable Annuity Life Ins. Co.*, No. 93-1612 (Jan. 18, 1995), slip op. 5 (quoting *Chevron*, 467 U.S. at 844).

Respondents brought this action as a facial challenge to the "harm" regulation insofar as it embraces any habitat modification activities. Respondents assume a "heavy burden" by attacking the regulation on its face. See *Rust* v. *Sullivan*, 500 U.S. 173, 183 (1991), quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). To prevail, they "must establish that no set of circumstances exists under which the [regulation] would be valid." *Reno* v. *Flores*, 113 S. Ct. 1439, 1446 (1993), quoting *United States* v. *Salerno*, 481 U.S. at 745; see also *INS* v. *National Ctr. for Immigrants' Rights*, 112 S. Ct. 551, 555 (1991); cf. *Bowen* v. *Yuckert*, 482 U.S. 137, 154 n.12 (1987); *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 593 (1987) (facial preemption challenge defeated by identifying possible set of conditions in which state requirements are not in conflict with federal law). Thus, respondents must establish that Congress intended that in no set of circumstances could Section 9's provision forbidding any person to "take" a protected species—*i.e.*, to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" such a species—be applied to conduct that "actually kills or injures wildlife" by means of "significant habitat modification or degradation." This respondents failed to do.

The district court sustained the "harm" regulation against respondents' facial challenge at step one of the *Chevron*

analysis, holding that the "language, structure and history of the ESA reveal that Congress intended an expansive interpretation of the word 'take,' an interpretation that encompasses habitat modification." Pet. App. 82a-83a. At the very least, however, the Secretary's interpretation of the term "harm" is a "permissible" or "reasonable" one in light of the "revealed design" of Congress in the ESA (*NationsBank*, slip op. 5), and it therefore should be sustained under step two of the *Chevron* analysis.

As its language makes clear, the regulatory definition of "harm" does not apply to habitat modification or degradation generally. It reaches only such acts that in turn actually kill or injure wildlife. This carefully tailored regulation is firmly supported by the text of the statutory definition of "take," the structure and purposes of the ESA as a whole, the legislative history of the original 1973 enactment of the ESA, the consistent and longstanding administration of the Act, and the 1978 and 1982 amendments to the Act that specifically addressed the subject of "takes." The court of appeals therefore erred in holding that the regulation's inclusion of *any* habitat modification activities—even those that "actually kill or injure wildlife"—is invalid on its face.

A. The Text And Structure Of The Act Support The Secretary's Interpretation

The Secretary's interpretation of the statutory term "harm" is affirmatively supported by the text and structure of the ESA in a number of respects.

1. The term "take" is defined in the Act to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. 1532(19). In ordinary usage, the word "harm," in its verb form, means "to cause hurt or damage to: INJURE," *Webster's Third New International Dictionary* 1034 (1986), or "to do or cause harm to; injure; damage; hurt," *The*

Random House Dictionary of the English Language 873 (2d ed. 1987). This common understanding of the word unquestionably encompasses an act that actually "kills or injures wildlife"—the basic definition of "harm" in the first sentence of 50 C.F.R. 17.3. Respondents do not challenge that basic definition of "harm" by the Secretary, and its soundness is demonstrated by the fact that the definition of "take" in the ESA itself expressly includes "kill" and "wound."

The second sentence of 50 C.F.R. 17.3, which respondents do challenge, merely elaborates on the basic definition in the first sentence by explaining its application in one particular context. The second sentence specifies that an act constituting "harm" may include the actual killing or injuring of wildlife by means of "significant habitat modification or degradation" that "significantly impair[s]" essential behavioral patterns of the wildlife. There is no reason why Congress would have intended to allow the killing or injuring of protected wildlife where that consequence is brought about by the destruction of habitat essential for the wildlife's breeding, feeding, or shelter, rather than by other means, such as the discharge of a firearm or similarly direct application of force (the types of actions to which the court of appeals believed the "take" prohibition should be limited, see Pet. App. 4a).

2. The court of appeals in fact acknowledged that the "potential breadth of the word 'harm' is indisputable" and that "harm" can be understood to include conduct encompassed by the regulatory definition. Pet. App. 3a-4a. The court nevertheless rejected the Secretary's interpretation by relying on the maxim *noscitur a sociis*. *Id.* at 6a-7a. That reliance was misplaced. The assumption underlying the court of appeals' invocation of *noscitur a sociis* was that Congress must have intended for certain words in the definition of "take" that involve the application of physical force ("hunt," "shoot," "trap," "capture") to furnish a narrowing focus even with

respect to "harm," despite that word's concededly broader connotation. Whatever utility the maxim *noscitur a sociis* might have in other settings, it does not assist respondents here, especially since the relevant statutory language contains both broader and narrower terms.[10]

The placement of "harm" between the words "harass" and "pursue" in the ESA's definition of "take" is sufficient in itself to refute the court of appeals' crabbed interpretation, for neither of those words necessarily (or even ordinarily) involves the direct application of force. There accordingly is no reason why the word "harm" should be artificially confined in that manner. Compare *Third Nat'l Bank in Nashville* v. *Impac Ltd.*, 432 U.S. 312, 322 (1977) (construing term by reference to words it is "sandwiched in between"); *Dole* v. *United Steelworkers*, 494 U.S. 26, 36 (1990) (statutory term

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[10] The maxim *noscitur a sociis* applies only where "the legislative intent or meaning of a statute is not clear." 2A Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 47.16 (5th ed. 1992) [*Sutherland*]; *Russell Motor Car Co.* v. *United States*, 261 U.S. 514, 519, 520 (1923). Thus, the majority's invocation of the maxim undermines its later statement (upon the denial of rehearing en banc) that its holding rested on a finding of an "unambiguously expressed" and "clear" determination by Congress that Section 9 does not reach the acts of habitat modification encompassed by the second sentence of 50 C.F.R. 17.3. See Pet. App. 95a. To be sure, a court may employ traditional tools of statutory construction at *Chevron* step one to determine whether Congress expressly resolved the relevant question, *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446-447 (1987). But because resort to the maxim *noscitur a sociis* necessarily is premised on some measure of textual ambiguity, a court should not lightly rely on that maxim to override the agency's interpretation of a particular statutory term that is otherwise reasonable and consistent with the context of the statute as a whole. See *Michigan Citizens for an Indep. Press* v. *Thornburgh*, 868 F.2d 1285, 1292 (D.C. Cir.) ("*Chevron* implicitly precludes courts' picking and choosing among various canons of statutory construction to reject reasonable *agency* interpretations of ambiguous statutes."), aff'd by an equally divided court, 493 U.S. 38 (1989).

may be "understood to be analogous to the examples surrounding it").

The structure of the statutory definition of "take" reinforces that conclusion in another respect. A number of terms at the beginning of the definition ("harass, harm, pursue") are broader than those that follow ("hunt, shoot, wound, kill, trap, capture or collect"). When specific words follow general words in a statutory enumeration, effect is given "to both the particular and the general words, by treating the particular words as indicating the class, and the general words as extending the provisions of the statute to everything embraced in that class, though not specifically named by the particular words." *Sutherland* § 47.17, at 189 (describing maxim *ejusdem generis*, a variation of *noscitur a sociis)*. In this case, the general word "harm" can be understood to apply the statutory term "take" to all conduct of the sort that the other words ("kill," "wound," etc.) merely exemplify, *Brown* v. *Gardner*, 115 S. Ct. 552, 555 (1994), including conduct that causes such consequences as killing or wounding by means of significant habitat modification. See 46 Fed. Reg. 29,491 (1981) (J.A. 56-57); 46 Fed. Reg. 54,749 (J.A. 68) ("Congress intended to create a definition of take which included all of the various ways of killing or injuring protected wildlife."). This construction gives effect to all the words in the definition so that none is superfluous, thereby answering a concern expressed by Judge Sentelle in his concurring opinion below. See Pet. App. 25a.[11]

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[11] There is no reasonable definition of "harm" that would not overlap with some of the other terms. Moreover, the principle against surplusage is in tension with *noscitur a sociis*. To avoid surplusage, the word "harm" must be given meaning that is different from, rather than synonymous with, the other terms. The court of appeals' interpretation, by contrast, does render the term "harm" superfluous.

3. Respondents' effort to carve out of the "take" prohibition those actual killings of or injuries to wildlife that are brought about by means of habitat modification or degradation also is inconsistent with "the object and structure of the Act as a whole." *Dole* v. *United Steelworkers*, 494 U.S. at 36. In *TVA* v. *Hill*, this Court described the ESA as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." 437 U.S. at 180. The Court also noted Congress's recognition that the destruction of habitat often poses the greatest risk to protected species, *id.* at 179, and that the ESA's "stated purposes were 'to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,' and 'to provide a program for the conservation of such . . . species . . .,'" *id.* at 180 (quoting 16 U.S.C. 1531(b)). To achieve those purposes, the Act contains numerous provisions that specifically address, in varying ways, the protection of habitat. See pages 7-9, *supra*; see, *e.g.*, 16 U.S.C. 1533(a)(3), (b)(2) and (b)(6)(C), 1534, 1536(a)(2). It would be directly contrary to both the comprehensive thrust of the Act and its recognition of the importance of habitat for species survival to construe the prohibition against "taking" a protected species not to reach the actual killing or injuring of wildlife that results from significant modification or degradation of habitat on which the wildlife depends for its "essential" behavioral patterns.

Furthermore, as we explain below (see pages 32, 34, *infra*), Congress amended Sections 7 and 10 in 1978 and 1982 to authorize exemptions to the taking prohibition in Section 9 in particular circumstances, and those exempting provisions are tailored precisely to accommodate incidental takes of protected species that are caused by land development and other forms of habitat modification. Congress's fashioning of exemptions for habitat modification activities that would otherwise constitute a "take" of protected species weighs

strongly against an interpretation of the Act that would altogether exclude such activities from the "take" prohibition in the first place.

B. The Validity Of The "Harm" Regulation Is Supported By The Background Of And Subsequent Amendments To The Endangered Species Act

Any doubts about whether the Secretary's interpretation of "harm" represents a reasonable interpretation of the ESA are removed by a consideration of the legislative history of the Act in 1973, as well as by the text and legislative history of the amendments to the Act in 1978 and 1982.

1. The background and legislative history of the 1973 Act support the Secretary's interpretation of "harm" and undermine that of the court of appeals. In the first place, the court of appeals' attempt to tie "harm" to what it perceived to be narrower terms in the ESA's definition of "take" that involve the direct application of physical force ignores the fact that the inclusion of "harass" and "harm" in the ESA constituted a marked departure from the definition of "take" in predecessor wildlife statutes, such as the Migratory Bird Treaty Act (MBTA), 16 U.S.C. 703 *et seq.*, and the Marine Mammal Protection Act (MMPA), 16 U.S.C. 1361 *et seq.* The definition of "take" under the Migratory Bird Treaty Act omits both "harm" and "harass." See 16 U.S.C. 703 (1988 & Supp. V 1993).[12] When Congress enacted the MMPA in 1972, it

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[12] The Migratory Bird Treaty Act, 16 U.S.C. 703 *et seq.*, was passed 55 years prior to the ESA for the purpose of halting the "indiscriminate slaughter" of migratory birds. See, *e.g.*, 55 Cong. Rec. 5544-5545 (1917); S. Rep. No. 2, 65th Cong., 1st Sess. (1917). It prohibits the taking of virtually every bird in the United States, not just endangered or threatened birds.

Even though the definition of "take" in the Migratory Bird Treaty Act is undoubtedly narrower than that in the ESA, see *Seattle Audubon Soc'y* v. *Evans*, 952 F.2d 297, 302-303 (9th Cir. 1991) ("[h]abitat destruction causes 'harm' to the owls under the ESA but does not 'take' them within the

included "harass" in the definition of "take." See 16 U.S.C. 1362(13) (Supp. V 1993).[13] Then, when enacting the ESA in 1973, Congress enlarged the concept of "take" still further by adding "harm" to the definition. See 16 U.S.C. 1532(19). The court of appeals' endeavor to maintain conformity with the narrowest terms defining "take" under the ESA defeats the deliberate enlargement of that concept under the ESA.

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meaning of the MBTA"), the MBTA has been applied to circumstances that cannot be characterized as involving a direct application of force. For example, *United States* v. *FMC Corp.*, 572 F.2d 902 (2d Cir. 1978), held that migratory waterfowl were "killed" in violation of the Migratory Bird Treaty Act's "take" prohibition as the result of the defendant's release of chemicals in its manufacturing process, even though the defendant did not intend to harm birds and did not know its action would be lethal to them.

[13] Contrary to the court of appeals' suggestion (Pet. App. 5a), *United States* v. *Hayashi*, 22 F.3d 859 (9th Cir. 1993), does not support the court's conclusion that the "take" prohibition under the ESA requires a substantially direct application of force. *Hayashi* involved a criminal prosecution for violation of the "take" provision under the MMPA. The Ninth Circuit specifically noted that the ESA "harm" regulation, "is not the controlling regulatory definition and is an improper starting point for any MMPA prosecution." 22 F.3d at 864; see also *id* at 862. The issue in *Hayashi* was whether a fisherman's firing of a rifle in order to scare porpoises away from his fishing lines constituted a criminal "take" by "harassment" under the MMPA, which is defined by a regulation, see 50 C.F.R. 216.3, that differs from the "harm" regulation at issue here. In holding that it did not, the court reasoned that the fisherman's action did not disrupt normal behavioral patterns because feeding from a fishing line is not part of porpoises' normal eating habits. 22 F.3d at 864-865. The court also believed that the fisherman's action did not have a significant impact on the porpoises because the disruption was of short duration and because regulations also prohibit the feeding of porpoises. *Ibid.* Thus, *Hayashi* turned on the court's conclusion that the activity in question had no significant adverse effect on the wildlife's normal and essential behavioral patterns. Moreover, the ruling in *Hayashi* is of no continuing importance, because in Section 12 of the MMPA Amendments of 1994, Pub. L. No. 103-238, 108 Stat. 557, Congress enacted a definition of "harassment" that is more expansive than the Ninth Circuit's interpretation in *Hayashi*.

The court of appeals' narrow focus on actions that involve the direct application of physical force also is inconsistent with the legislative history addressing the word "harass," which immediately precedes "harm" in the statutory definition of "take" and which, as pointed out above (see pages 22-23, *supra*) does not connote the direct application of physical force. The House Report on the 1973 Act explained that the prohibition of actions that "harass" species, "whether intentional or not," would allow the "Secretary to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young." H.R. Rep. No. 412, 93d Cong., 1st Sess. 11 (1973).[14] Such otherwise benign actions as birdwatching do not reasonably fit the supposed paradigm of direct physical force applied against an animal. See *Palila* v. *Hawaii Dep't of Land & Natural Resources*, 852 F.2d 1106, 1108-1109 (9th Cir. 1988) (*Palila II*) ("If the 'harassment' form of taking includes activities so remote from actual injury to the bird as birdwatching, then the 'harm' form of taking should include more direct activities."—in that case, the maintenance of sheep that fed on and destroyed woodlands on which an endangered species depended for survival).[15]

Finally, a narrow focus on physical blows to the body of individual animals would defeat the intent expressed by the responsible congressional committees that "take" have a broad scope. See S. Rep. No. 307, 93d Cong., 1st Sess. 7 (1973)

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[14] The passage from the House Report quoted in the text also confirms that the taking prohibition focuses on the "effect" the conduct has on a species, rather than on the means by which the effect is brought about.

[15] *Palila II* was a suit by environmental groups against the State of Hawaii for maintaining feral sheep in the remaining habitat areas of the endangered Palila bird. The sheep were maintained for hunting, but their overbrowsing and destruction of trees upon which the Palila depended for its survival were held to cause a "take" in violation of Section 9.

(" 'Take' is defined * * * in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife."); see also H.R. Rep. No. 412, 93d Cong., 1st Sess. 11, 15 (1973).

The court of appeals believed that its narrow reading of "take" was supported by the failure of the Senate Committee on Commerce to adopt a definition in the version of the bill (S. 1983, 93d Cong., 1st Sess. (1973)) that, as introduced, would have made modification of habitat a form of "take." See Pet. App. 8a-9a. The proposal in question, however, would have made *all* destruction, modification or curtailment of a listed species' habitat or range a "take," regardless of the effect on a listed species.[16] In other words, under that provision, habitat modification would have been a *per se* violation of Section 9. The provision did not contain the limitations inhering in the concept of "harm" to the species itself. "Harm" was added to the definition of "take" later in the legislative process (after the habitat modification provision was omitted) and, under the Secretary's interpretation, it applies only if the habitat modification or degradation is significant and actually kills or injures protected wildlife.

Moreover, S. 1983 was one of two endangered species bills under consideration by the Senate committee. The other bill contained all of the terms in the definition of "take" as finally enacted except "harass" and "harm." See S. 1592, 93d Cong., 1st Sess. § 2(d)(4) (reproduced at 119 Cong. Rec. 12,432 (1973)). The bill reported out of committee included the terms in S. 1592 as introduced, plus "harass" from S. 1983. See S. Rep. No. 307, *supra*, at 14. The Senate Report did not explain why the Committee included some terms in the definition but not

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[16] The bill in question defined "take" to mean to "threaten, harass, hunt, capture, or kill [an endangered species] * * * or the destruction, modification, or curtailment of its habitat or range." S. 1983, 93d Cong., 1st Sess. § 3(6) (1973).

others, but it did express the intent (quoted above) to define "take" in the "broadest possible manner to include every conceivable way in which a person can 'take' " fish or wildlife. *Id.* at 7. The word "harm" was then added during the Senate floor debate as part of a package of amendments that were intended "to achieve the purposes of the bill" and to "clarify some confusion caused by language remaining in the bill from earlier drafts or omitted from earlier drafts which went unnoticed during the final committee markup." 119 Cong. Rec. 25,683 (1973) (Sen. Tunney). In these circumstances, the Senate committee's failure to adopt a provision referring broadly to habitat modification *per se* (without regard to any effect on wildlife) does not suggest that the Secretary acted unreasonably in giving a far more circumscribed scope to a different term ("harm") under a regulation that *does* focus on resulting injury or death to wildlife. Cf. *United States* v. *Lee*, 937 F.2d 1388, 1391 (9th Cir. 1991) (declining to give limiting significance to deletion of word in Lacey Act because overall congressional intent was to expand scope of the Act), cert. denied, 112 S. Ct. 977 (1992).[17]

2. The Secretary promulgated the original version of the "harm" regulation in 1975 (50 C.F.R. 17.3; see 40 Fed. Reg. 44,412, 44,416 (J.A. 49, 51)), shortly after the ESA was passed. Following the 1981 revision (46 Fed. Reg. 54,748 (J.A. 65)), it has remained in effect ever since. The regulation therefore

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[17] The legislative history likewise does not support the court of appeals' suggestion that Congress intended land acquisition pursuant to Section 5 of the ESA to be the exclusive means by which habitat destruction on private lands can be curbed under the ESA. The legislative history cited by the court of appeals (Pet. App. 8a-9a) simply indicates that Congress considered acquisition of private land to be one available tool in addressing habitat concerns. It would depart from the ESA's comprehensive design to assume that Congress compartmentalized the problems associated with endangered species and provided only a single solution to a complex problem—especially one as central to the Act as the habitat of protected species.

represents the Secretary's contemporaneous and long-standing interpretation of the term "harm," and as such is entitled to particular deference. See *Brown* v. *Gardner*, 115 S. Ct. at 557, citing *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978). The subsequent history of the regulation and the provisions later added to the Act to address the "take" prohibition validate that interpretation and build upon the protection it affords.

3. Significantly, only three years after the "harm" regulation was promulgated, this Court discussed the regulation's operation and its place in the overall statutory scheme in *TVA* v. *Hill*. The Court stated:

> The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute. All persons, including federal agencies, are specifically instructed not to "take" endangered species, meaning that no one is "to harass, harm, pursue, hunt, shoot, wound, trap, capture, or collect" such life forms.

437 U.S. at 184-185 (quoting 16 U.S.C. 1538(a)(1)(B) (1976)). In a footnote to the word "harm" in the statutory definition of "take," the Court quoted (with emphasis) the "harm" regulation's inclusion of "*significant environmental modification or degradation*" that actually injures or kills wildlife, and explained that it did "not understand how TVA intends to operate Tellico Dam without 'harming' the snail darter." 437 U.S. at 184-185 n.30. In light of this Court's early recognition of the central role played by the take prohibition (specifically including the "harm" regulation) in achieving the overall purposes of the Act, the Court should be reluctant, 17 years later, to endorse an interpretation of "harm" that would render the current version of that same regulation facially invalid insofar as it interprets the Act to prohibit those

significant modifications or degradations of habitat that actually kill or injure protected wildlife.

4. When Congress enacted the Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3752, in the immediate wake of this Court's decision in *TVA* v. *Hill* (see H.R. Rep. No. 1625, 92d Cong., 2d Sess. 3-4, 10 (1978)), it chose to retain the "harm" regulation in effect. During the extensive hearings that preceded those amendments, representatives of the timber industry and other witnesses called attention to the "take" prohibition in Section 9, its application to activities on private land, and the regulation defining "harm" to include significant environmental modification or degradation that significantly disrupts normal behavioral patterns; and a number of witnesses urged Congress to refine the statutory definition of "take" so as to exclude land management activities on private lands.[18] In response to those criticisms, Senator Garn proposed (and later withdrew) amendments that included the following redefinition of "take":

> The term "take" means purposefully to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct which is inimical to the continued existence of an endangered or threatened species. It does not include effects from normal forestry, farming, ranching or water management practices.

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[18] *Endangered Species Oversight: Hearings Before the Subcomm. on Resource Protection of the Senate Comm. on Environment and Public Works*, 95th Cong., 1st Sess. 306-307, 316 (1977); *Amending the Endangered Species Act of 1973: Hearings on S. 2899 Before the Subcomm. on Resource Protection of the Senate Comm. on Environment and Public Works*, 95th Cong., 2d Sess. 50, 52, 59, 222, 260, 389 (1978); *Endangered Species, Parts 1 & 2: Hearings Before the Subcomm. on Fisheries and Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 95th Cong., 2d Sess. 206, 211, 223, 413, 724-725, 726-727 (1978).

124 Cong. Rec. 21,565 (1978).

Despite the attention focused on the subject, Congress did not revise the statutory definition of "take" or modify the general operation of the prohibition in Section 9 as it affects habitat-modification activities encompassed by the "harm" regulation. Instead, Congress responded in a far more limited manner that was premised on the regulation's continued existence. It did so by providing relief from the "take" prohibition in the specific context of the exemption mechanism it added in Section 7(h) of the Act, 16 U.S.C. 1536(h), which permits a project that would otherwise violate Section 7(a)(2) to go forward if it is authorized by a specially constituted Endangered Species Committee. See 16 U.S.C. 1536(e)-(*o*). Recognizing that an exemption from Section 7(a)(2) would not remove a project from the "take" prohibition in Section 9(a), Congress included Section 7(*o*) in the Act to provide (emphasis added):

> Notwithstanding sections 4(d) and 9(a) of this Act *or any regulations promulgated pursuant to such sections*, any action for which an exemption is granted under subsection (h) of this section shall not be considered a *taking* of any endangered or threatened species with respect to any activity which is necessary to carry out such action.

Pub. L. No. 95-632, § 3, 92 Stat. 3759 (codified at 16 U.S.C. 1536(*o*) (Supp. III 1979)).[19]

Against the backdrop of this Court's discussion of the "harm" regulation in *TVA* v. *Hill* only five months earlier, as

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[19] The House Report explained that this provision (which was then contained in Section 7(k)(2) of the bill, see H.R. Rep. No. 1625, *supra*, at 51) was included "in recognition of the fact that even though a project might be exempted from the requirements of section 7, section 9 of the act would still prohibit the 'taking' of any endangered animal species." H.R. Rep. No. 1625, *supra*, at 25.

well as the specific discussion of that regulation in the legislative history of the 1978 amendments, the reference in the new Section 7(*o*) to "regulations promulgated pursuant to [section 9(a)]" plainly encompasses the "harm" regulation.[20] Yet far from disapproving that regulation or the interpretation of "harm" it embodied, Congress instead carved out only a narrow exception to the "take" prohibition and its implementing regulations and otherwise left those regulations in place.

5. Following the 1978 amendments to the Act, the Secretary revised the "harm" regulation in 1981 to clarify that it applies only to significant habitat modification or degradation that actually kills or injures a species. See page

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[20] During floor consideration of the bill, the House, by a roll-call vote of 231-157, adopted an amendment that would have entirely exempted the Tellico Dam Project from the Act and also would have provided that any "harassment, harm, killing or wounding" of any endangered or threatened species attributable to the construction or operation of the project would not be considered to be a taking under Section 9(a)(1). 124 Cong. Rec. 38,148 (1978); see *id.* at 38,150-38,151. The Senate bill did not contain such a provision. The Conference Committee adopted and Congress enacted a compromise that called for expedited consideration of the Tellico Dam Project under the special exemption provisions added to Section 7. See Pub. L. No. 95-632, § 5, 92 Stat. 3761 (codified at 16 U.S.C. 1539(i)(1) (Supp. III 1979)); the Endangered Species Committee subsequently declined to grant an exemption, see Congressional Research Service, Senate Comm. on Environment and Public Works, 97th Cong., 2d Sess., *A Legislative History of the Endangered Species Act of 1973, as amended*, at Part V, pp. 1235-1236 (Comm. Print 1982). Congress thereafter directed TVA to complete construction and operation of the Tellico Dam and Reservoir, "notwithstanding the provision of 16 U.S.C. chapter 35 [the ESA], or any other law." Pub. L. No. 96-69, Tit. IV, 93 Stat. 449. H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 24-25 (1978). The special provision in the ESA for expedited consideration of the Project was then repealed (and replaced by another provision in 16 U.S.C. 1539(i) that is of no relevance here) by Section 6(5) of the Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, 96 Stat. 1424.

6, *supra*. Congress then amended the Act once again in the Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, 96 Stat. 1411. In a number of respects, those amendments further reinforce the validity of the "harm" regulation.

a. Of particular relevance to this case, Congress affirmatively acted in 1982 to lessen the restriction imposed by Section 9's take prohibition by authorizing the Secretary to issue permits under Section 10 to allow a taking that is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. 1539(a)(1)(B) (as added by Pub. L. No. 97-304, § 6, 96 Stat. 1422). The background and text of that provision show that Congress, like the Secretary, understood Section 9 to prohibit actions that cause a "take" through habitat modification.

The House Report made clear that "by use of the word 'incidental' the Committee intend[ed] to cover situations in which it is known that a taking will occur if the other activity is engaged in but such taking is incidental to, and not the purpose of, the activity." H.R. Rep. No. 567, 97th Cong., 2d Sess. 31 (1982). Thus, "incidental" was not intended to cover simply inadvertent takings of a listed species that might occur in conjunction with, *e.g.*, the trapping or hunting of a nonlisted species. Rather, it was intended to include takings that are known ahead of time to be a consequence of an otherwise lawful activity—precisely the situation that arises when there are incidental takings through land development or other types of habitat modification or degradation.

The applicability of the incidental take permit process to habitat modification is also reflected in the text of Section 10 that describes the "conservation plan" that must be prepared by an applicant. See 16 U.S.C. 1539(a)(2). In the conservation plan, the applicant must specify, *inter alia*, the "impact" that is likely to result from the taking and what steps the applicant will carry out to "minimize and mitigate" such impacts. 16 U.S.C. 1539(a)(2)(A)(i) and (ii); see also 16 U.S.C. 1539(a)(2)

(B)(i) and (ii). The focus on minimization and mitigation demonstrates that Congress was concerned not merely with inadvertent takings that might occur during hunting or trapping, but also with those having varying degrees of impact that could be determined ahead of time and controlled—that is, actions such as habitat modification that can often be tailored in their scope, timing, or location. Thus, based on the statutory text that Congress enacted in 1982 to add flexibility to Section 9's take prohibition, it is all the more reasonable for the Secretary to interpret the category of permitted "takes"—those that are merely "incidental" to otherwise lawful activity—to encompass habitat modification or degradation that actually kills or injures protected wildlife. Congress's enactment of a detailed mechanism for permitting such activities under specified conditions weighs against a construction of the prohibition that would not bar those activities in the first place.

The legislative history shows, moreover, that Congress had incidental takes through habitat modification specifically in mind when it created the Section 10 incidental take program. The permit process was described in the Senate Report as being modeled after the response to a specific situation in San Mateo County, California, in which the "taking" of endangered butterflies was incidental to "the development of some 3000 dwelling units" on a site inhabited by the species—*i.e.*, was incidental to habitat modification. S. Rep. No. 418, 97th Cong., 2d Sess. 10 (1982).[21] The Conference Report similarly

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[21] The cited development is described further in *Friends of Endangered Species, Inc.* v. *Jantzen*, 760 F.2d 976 (9th Cir. 1985); *Endangered Species Act: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 97th Cong., 2d Sess. 331-335 (1982) [*1982 House Hearings*]. Not surprisingly, that housing development project received the first Section 10 incidental take permit issued by the FWS. See generally Timothy Beatley, *Habitat Conservation Planning* 23-24, 54-68 (Univ. of Texas Press 1994).

discussed the San Mateo project in detail, noting that large portions of the butterflies' habitat was privately owned, that the County had conducted an exhaustive study of the location of the butterflies and "their food plants," and that the conservation plan developed through governmental and private efforts "preserves sufficient habitat to allow for enhancement of the survival of the species." See H.R. Conf. Rep. No. 835, 97th Cong., 2d Sess. 30-32 (1982).[22]

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[22] In discussing the significance of the 1982 amendments, the court of appeals suggested (Pet. App. 11a) that the "key example" of the sort of problem Congress had in mind when it enacted Section 10(a)(1)(B) was the incidental take caused by a water intake associated with a proposed nuclear power plant. See *1982 House Hearings* at 358; *Endangered Species Act Amendments of 1982: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 97th Cong., 2d Sess. (1982) 299-303 [*1982 Senate Hearings*]. The nuclear power plant would have resulted in a taking because it would have caused the "entrainment or impingement" of Shortnose Sturgeon eggs, larvae or adults. *1982 House Hearings* at 358. The court of appeals suggested that such a taking is not the result of "habitat modification" and that the conservation plan required by Section 10(a) made the most sense for this type of incidental "take." Pet. App. 12a. Both suggestions are faulty.

First, construction and operation of a water intake structure is appropriately characterized as "habitat modification" within the meaning of 50 C.F.R. 17.3. See, *e.g.*, *United States* v. *Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126, 1133 (E.D. Cal. 1992) (water district's pumping "harms" fish within the meaning of 50 C.F.R. 17.3 by creating water velocity that causes salmon to be pinned or battered against screens or by diverting fish into channels full of predators).

Second, there is no foundation for the court of appeals' suggestion that the nuclear power plant example played the primary instigating role in Congress's authorization of incidental take permits. As explained in the text, the congressional reports and hearings demonstrate that Congress had takes by habitat modification primarily in mind. Moreover, Section 10 applies only to non-federal projects. The proposed nuclear power plant, however, required a federal permit and thus had to meet the Section 7(a)(2) "jeopardy" and "critical habitat" restrictions. Northeast Utilities sought an amendment to the ESA because its project would have remained subject to

Also, in the hearings that preceded enactment of the 1982 amendments, objections to the regulatory definition of "harm" were once again voiced.[23] Similarly, the Ninth Circuit's decision in *Palila* v. *Hawaii Dep't of Land & Natural Resources*, 639 F.2d 495 (1981) (*Palila I*), finding a prohibited taking based on "harm" caused by habitat modification, was before Congress during its consideration of the 1982 amendments. *1982 House Hearings* at 273, 291, 331. It therefore is not surprising that the Senate Report specifically noted that "section 9 * * * prohibits the taking of any endangered fish or wildlife, *including harm which may occur as a result of habitat modification*." S. Rep. No. 418, *supra*, at 26 (emphasis added);[24] see also H.R. Rep. No. 567,

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the take prohibition in Section 9 even if it had complied with Section 7(a)(2). *1982 House Hearings* at 358-360; *1982 Senate Hearings* at 297-309. Northeast proffered its illustration to support its proposal that the ESA be amended to provide that a project be immunized from Section 9 whenever the Secretary issues a "no jeopardy" opinion in connection with Section 7 consultation on a project—a problem separately addressed by Congress's enactment of Section 7(b)(4) and (*o*)(2), discussed at pages 38-39, *infra*. Northeast explicitly suggested, however, that "where no Section 7 consultation has been obtained because there is no federal involvement in the activity, Section 9 would remain fully operative." *1982 House Hearings* at 360.

[23] See *1982 House Hearings* at 240, 262, 273, 328-329, 331, 343; see also *1982 Senate Hearings* at 320-321.

[24] The passage in the Senate Report quoted in the text was part of the discussion of an amendment to Section 9(a)(2) (now codified, as later amended, at 16 U.S.C. 1538(a)(2)(B)), that makes it unlawful to remove and reduce to possession endangered species of *plants* on federal lands. See Pub. L. No. 97-304, § 9(b)(i), 96 Stat. 1426. The Report explained that although Section 9 "prohibits the taking of endangered species of fish or wildlife," it "does not * * * prohibit the taking of endangered plants," and that, as a result, "harm to species of plants" that "may occur as a result of habitat modification" would not be within the scope of the new prohibition against removal of plants from federal lands. S. Rep. No. 418, *supra*, at 26.

supra, at 15 (incidental take permit provisions will respond to "situations where the unintentional taking may occur on private lands owned by a developer" and assist "private land owners" who present a "conservation plan"); *id.* at 31 (amendment to Section 10 addresses concerns of "private landowners").

b. Congress also amended Section 7 of the Act in 1982 to provide for the Secretary to issue an incidental take statement as part of the biological opinion that he prepares at the conclusion of the formal consultation process under Section 7(a)(2). See 16 U.S.C. 1536(b)(4). The terminology of that provision directly parallels that of the incidental take permit provision added to Section 10, discussed above, and for that reason it likewise confirms that incidental takes include those brought about by habitat modification or degradation of the sort described in the "harm" regulation. In addition, Congress enacted a new Section 7(*o*)(2) of the Act to provide that "[n]otwithstanding sections 4(d) and 9(a)(1)(B) and (C) *or any regulation promulgated to implement either such section*," any "taking that is in compliance with the terms and conditions specified in a written [incidental take] statement provided under subsection (b)(4)(iii) [of Section 7] shall not be considered to be a taking of the species concerned." Pub. L. No. 97-304, § 4(a)(7), 96 Stat. 1420 (emphasis added) (codified at 16 U.S.C. 1536 (*o*)(2) (1982).[25] By virtue of the emphasized

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Thus, Congress once again tailored the Act with specific reference to the "harm" regulation.

[25] See H.R. Rep. No. 567, *supra*, at 26-27. The same provision of the 1982 amendments also reenacted (as Section 7(*o*)(1) of the ESA) the exception from the take prohibition in Section 9(a) and implementing regulations for activities that are covered by an exemption granted under Section 7(h) of the Act. See 16 U.S.C. 1536(*o*)(1).

In 1986, subsection (b)(4) of Section 7 was amended to move the reference to the terms and conditions in the incidental take statement from subsection (b)(4)(iii) to a new subsection (b)(4)(iv) (where they now appear), and

language, Congress once again specifically recognized in the text of the Act itself the "regulation[s]" promulgated to "implement," *inter alia*, the prohibition in Section 9(a)(1)(B) against the taking of protected species.[26] In light of the

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subsection (b)(4)(iii) was revised to provide for the incidental take statement to specify, in the case of marine mammals, the measures necessary to comply with Section 101(a)(5) of the Marine Mammal Protection Act (16 U.S.C. 1371(a)(5)) with regard to such taking. Pub. L. No. 99-659, § 411(b)(4)-(6), 100 Stat. 3742 (codified at 16 U.S.C. 1536(b)(4)(iii) and (iv)). Corresponding amendments were made in 1986 to Section 7(*o*). These amendments consisted of: the addition of Sections 101 and 102 of the MMPA (16 U.S.C. 1371 and 1372) to the "notwithstanding" clause at the beginning of Section 7(*o*); the substitution of subsection (b)(iv) for subsection (b)(iii) in Section 7(*o*)(2); and the insertion of the word "prohibited" before "taking" in Section 7(*o*)(2). See Pub. L. No. 99-659, § 411(c), 100 Stat. 3742. These amendments are reflected in the 1988 codification of Section 7(*o*)(2). See 16 U.S.C. 1536(*o*)(2); see also 132 Cong. Rec. 31,294-31,295, 32,185 (1986) (describing 1986 amendments to ESA).

[26] There is yet another feature of the 1982 amendments (involving "experimental populations") that is premised upon and accommodates the "harm" regulation's inclusion of certain habitat modifications within the statutory take prohibition. The Senate Report explained that the Secretary already had the authority to establish "experimental populations" to aid recovery of a species, such as by reestablishment in the wild of captive-bred animals. The Report continued: "Other Federal agencies, State officials and *private individuals*, however, *are reluctant to allow experimental or new populations of endangered species to be established on their land for fear that* the section 7 jeopardy standard, critical habitat designation, and *the section 9 taking prohibitions will be applied to limit their land management options*." S. Rep. No. 418, *supra*, at 3 (emphasis added). Congress's response was not to repeal the application of Section 9 to all "land management" activities, which is the result the court of appeals reached. Instead, Congress established a special mechanism in a new Section 10(j) to add still further flexibility to the take prohibition in the particular context of experimental populations. See *id.* at 3-4, 7-9; Pub. L. No. 94-307, § 6(6), 96 Stat. 1424 (codified at 16 U.S.C. 1539(j)). Congress provided, *inter alia*, for experimental populations of endangered species to be treated as threatened species, see 16 U.S.C. 1539(j)(2)(C), which has the effect of

prominence during congressional consideration of the 1982 amendments of the "harm" regulation and the taking of species caused by habitat modification, Section 7(*o*)(2)—together with the provisions elsewhere in Section 7 and in Section 10 for allowing such incidental takings in particular circumstances—must be regarded as a congressional ratification of the interpretation of "harm" embodied in the Secretary's regulation.

C. The Court of Appeals' Reasons for Rejecting the Secretary's Reasonable Interpretation of "Harm" Are Without Merit

We have explained in Points A and B that the interpretation of "harm" set forth in 50 C.F.R. 17.3 is affirmatively supported by the text and structure of the ESA, its legislative history, this Court's decision in *TVA* v. *Hill*, and the subsequent amendments to the Act in 1978 and 1982. The court of appeals failed to appreciate the strength of each of those considerations, and we have already answered its efforts to minimize them in the course of our discussion above.

The court of appeals advanced several additional objections to the Secretary's interpretation, based on the overlap it believed the Secretary's interpretation would create between Sections 7 and 9 of the Act and the potential breadth it ascribed to that interpretation. Those remaining objections are without merit.

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removing such populations from the automatic coverage of the take prohibition in Section 9(a)(1)(B) itself and instead subjecting the application of that prohibition to experimental populations to the discretion of the Secretary under Section 4(d), 16 U.S.C. 1533(d). The experimental populations of gray wolves that were recently introduced into central Idaho and into Yellowstone National Park in Montana (and that are endangered in those areas) are covered by that special provision. See 50 Fed. Reg. 60,252 (1994).

1. Contrary to the court of appeals' interpretation, the Secretary's interpretation of "harm" for purposes of the Section 9 prohibition against the taking of listed species does not impose on private parties the equivalent of federal agencies' Section 7 obligation to avoid destruction or adverse modification of critical habitat. The Secretary's "harm" regulation prohibits only habitat modification that causes actual death or injury, and does not prohibit habitat degradation that merely retards recovery. See *Palila II*, 852 F.2d at 1108-1110.

The court of appeals incorrectly suggested (Pet. App. 92a-93a) that because "critical habitat" is defined as areas "essential to the conservation of the species," any alteration or use of land designated as "critical habitat" necessarily will result in prohibited "harm" to the species. That is not true. The obligations on federal agencies arising from Section 7 are more extensive than those imposed on such agencies and other persons by Section 9. An action may result in the destruction or adverse modification of critical habitat, and yet not result in a taking of an endangered species because it does not "actually kill or injure wildlife." For example, where there is an area designated as critical habitat for a species but not currently inhabited by the species,[27] a federal agency may be prevented by Section 7 from authorizing or carrying out action in the area, such as the harvesting of trees that, if allowed to stand, would likely attain the attributes of suitable

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[27] As explained above, see note 5, *supra*, critical habitat includes areas that are not occupied by the species, but are nonetheless "essential to the conservation of the species." 16 U.S.C. 1532(5). Conservation means the use of all methods necessary to recover the species so that it may be removed from the lists of species protected by the ESA. 16 U.S.C. 1532(3). Critical habitat for many species therefore includes areas the protection of which is crucial to the species' recovery but not to its bare survival.

habitat for the species. Harvest of a similar area would not, however, be prevented by the Section 9 "take" prohibition.[28]

At the same time, the Section 9 "take" prohibition may restrict conduct that would not violate Section 7. A particular action may cause a taking of individual members of a listed species, but not adversely affect the species as a whole to such an extent that it violates the "jeopardy" prohibition or critical habitat restrictions in Section 7(a)(2). For example, interference with the spawning of particular fish would constitute prohibited "harm" to those fish because of its interference with their breeding, but its transitory nature and spatially circumscribed effect would likely prevent it from triggering a determination of "jeopardy" to the species or "adverse modification" of its critical habitat. Also, modification of habitat that actually kills or injures wildlife (and therefore constitutes a prohibited "take"), but is not within critical habitat designated under Section 4,[29] does not

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[28] Part of the reason for the court's erroneous analysis was its apparent misinterpretation of critical habitat as "simply another way of referring to habitat modifications so significant to the species that they might lead to death (or at least some very serious injury) for members of the species." See Pet. App. 92a. As noted above (see notes 5 and 27 *supra*), however, in appropriate cases, unoccupied potential habitat may be designated as critical for a listed species in order to provide for "natural range expansion into adjacent suitable habitat." 49 Fed. Reg. 38,904 (1984). Indeed, designation of critical habitat is most likely to furnish meaningful additional protections for listed species when federal actions are likely to take place that will impact upon suitable, but unoccupied, habitat.

[29] Under Section 4 of the ESA, the Secretary's decision whether to designate critical habitat for a species is not solely a biological judgment. The Secretary is also required to consider and weigh "the economic impact, and any other relevant impact," of such a designation. 16 U.S.C. 1533(b)(2).

Moreover, the Secretary "may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines based on the best scientific and commercial data available, that the failure

violate Section 7 unless it rises to the level of jeopardizing the continued existence of the listed species.

Thus, Sections 9 and 7 are not rendered coextensive by the "harm" regulation. They do overlap to some degree, however, as do many provisions of the ESA. Indeed, it is by design that various sections of the ESA provide for protection of endangered and threatened species through a variety of measures. For example, within Section 7(a)(2) itself, the determination whether a federal action is "likely to jeopardize the continued existence" of a listed species may overlap with the determination whether the action is likely to "result in the destruction or adverse modification" of habitat designated by the Secretary as "critical." 16 U.S.C. 1536(a)(2). In a similar vein, the fact that an action that would "jeopardize the continued existence" of a listed species or "destroy or adversely modify" its critical habitat in contravention of Section 7 may also result in a taking of the species in violation of Section 9 does not render either Section superfluous. Nor does any such overlap indicate that the Secretary's interpretation of "harm" is unreasonable.

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to designate such area as critical habitat will result in the extinction of the species concerned." 16 U.S.C. 1533(b)(2). Designation of critical habitat is authorized only "to the maximum extent prudent." 16 U.S.C. 1533(b)(6)(C)(ii). By regulation, "[a] designation of critical habitat is not prudent *when one or both* of the following situations exist: (i) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species, or (ii) Such designation of critical habitat would not be beneficial to the species." 50 C.F.R. 424.12(a)(1)(i) and (ii) (emphasis added). The factors to be considered in individual cases include whether "designation of critical habitat may generate public antagonism that could lead to vandalism" of habitat, and whether there would a "net benefit to the conservation of the species and their habitats." 49 Fed. Reg. 38,903 (1984).

It is significant in this regard that *both* Section 7 *and* Section 9 apply to federal agencies.[30] As we have explained above (see pages 32, 38, *supra*), Congress addressed their interaction and provided for their accommodation in Section 7(b) and (*o*) of the Act, specifically recognizing that authorization or exemption of a project under Section 7 does *not* exempt it from the taking prohibition in Section 9.[31] The court of appeals therefore erred in relying on the existence of critical habitat restrictions in Section 7, which do not even apply to private persons (except when such persons apply for a federal permit or license), as a reason for also construing Section 9 not to apply to habitat modification or degradation by private parties—even when it actually kills or injures protected wildlife.

2. Far from applying the proper standard for determining whether a regulation is invalid on its face (*i.e.*, whether there are any circumstances under which the regulation would be valid), the court of appeals took the opposite approach—it invalidated the "harm" regulation on the basis of imagined applications that were not before it. That analytical error manifested itself in a number of ways.

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30 The "take" prohibition in Section 9(a)(1)(B) applies to "any person," 16 U.S.C. 1538(a)(1)(B), and "person" is defined to include any "department, or instrumentality of the Federal Government." 16 U.S.C. 1532(13).

31 Section 7(*o*) confirms Congress' awareness that a Section 9 "take" may occur even though the action does not violate Section 7(a)(2). Thus, Section 7(*o*)(2) provides that any taking that is in compliance with the terms and conditions of an "incidental take" statement (see 16 U.S.C. 1536 (b)(4)(iv); page 38, *supra*) shall not be considered a prohibited take, and Section 7(*o*)(1) provides that any action granted an exemption under Section 7(h) shall not be considered a "taking" of listed species. See H.R. Rep. No. 1625, *supra*, at 25) (Section 7(*o*)(1) was included "in recognition of the fact that even though a project might be exempted from the requirements of section 7, section 9 of the act would still prohibit the 'taking' of any endangered animal species").

a. The court of appeals failed to take into account the fact that the requirement of showing "actual death or injury" directly traceable to habitat-disturbing actions imposes significant limitations on the regulation's application. When the Secretary revised the "harm" regulation in 1981, he emphasized the circumscribed reach of its second sentence. He explained that the

> additional language makes it clear that habitat modification or degradation, standing alone, is not a taking pursuant to section 9. To be subject to section 9, the modification or degradation must be *significant*, must *significantly impair essential* behavioral patterns, and must result in *actual* injury to a protected wildlife species. The word "impair" was substituted for "disrupt" to limit harm to situations where a behavioral pattern was adversely affected and not simply disturbed on a temporary basis with no consequent injury to the protected species.

46 Fed. Reg. 54,750 (1981) (J.A. 72).

The court of appeals also overlooked the cases in which courts have applied the regulation in an appropriate manner.[32] The courts that have found violations of the regulation have recognized that it applies only where actual injury or death directly traceable to the actions of the defendant has occurred or will occur. See, *e.g.*, *Palila I*, 639 F.2d at 498; *Palila II*, 852 F.2d at 1108-1110; *Sierra Club* v. *Yeutter*, 926 F.2d 429 (5th Cir. 1991) (enjoining Forest Service from even-aged lumber practices following documentation of dramatic decline in red-cockaded woodpecker colonies found traceable to lumbering

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[32] The fact that other courts of appeals have upheld particular applications of the challenged regulation should weigh heavily in favor of upholding its facial validity. See *National Treasury Employees Union* (*NTEU*) v. *Bush*, 891 F.2d 99, 101 (5th Cir. 1989).

practices); *United States* v. *Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126, 1133 (E.D. Cal. 1992) (water district's pumping creates water velocity that causes salmon to be pinned or battered against screens or diverts fish into channels full of predators).

By the same token, courts have correctly interpreted the "harm" prohibition not to extend to activity that only potentially, as opposed to actually, causes (or will cause) harm. *American Bald Eagle* v. *Bhatti*, 9 F.3d 163, 166 (1st Cir. 1993) ("courts have granted injunctive relief only where petitioners have shown that the alleged activity has actually harmed the species or if continued will actually, as opposed to potentially, cause harm to the species"); see also *National Wildlife Fed'n* v. *Burlington N. R.R.*, 23 F.3d 1508, 1511-1513 (9th Cir. 1994) (corn spill was localized in nature and did not constitute significant habitat modification or cause significant impact to grizzly bears); *Pyramid Lake Paiute Tribe of Indians* v. *United States Dep't of Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990) (evidence does not establish that diversion of water actually caused spawning problems); *National Wildlife Fed'n* v. *National Park Serv.*, 669 F. Supp. 384 (D. Wyo. 1987) (insufficient evidence of injury from plan designed to reduce conflicts between humans and grizzly bears); *Morrill* v. *Lujan*, 802 F. Supp. 424, 430-433 (S.D. Ala. 1992) (insufficient evidence that destruction of habitat would cause injury to mouse).

b. The court of appeals also suggested that the interpretation of "harm" in the regulation is overly broad because it is directed at harm flowing from the withholding of a benefit, rather than physical intrusions that wound an individual member of an endangered species. Pet. App. 3a-4a. The panel majority's statement upon denial of rehearing en banc reiterated that view and pointed to the commentary accompanying the promulgation of the "harm" regulation, which stated that an "act" is inclusive of either commissions

or "omissions" that would be prohibited by Section 9. Pet. App. 91a; 46 Fed. Reg. 54,750 (1981) (J.A. 72). An "omission" constitutes an "act" prohibited by Section 9, however, only if there is a legal duty to act and the failure to discharge that duty causes significant habitat modification or degradation that in turn leads to death or injury to protected wildlife.[33] Such an omission might arise, for example, from a duty to maintain a licensed dam structure. A maintenance omission causing a dam breach could significantly destroy habitat and cause death or injury to a listed species as a result. The commentary cited by the majority below does not encompass passive acts of nonfeasance or create a duty (where none otherwise would exist) to maintain a listed species' habitat.

c. The court of appeals expressed the view that the "harm" regulation reflects an improbable relation to congressional intent because it might forbid any modification of an area between 35 and 42 million acres in size, which "some scientists" believed was necessary to the survival of the threatened grizzly bear—even though the court acknowledged that such broad coverage represented the views of an "adherent of aggressive protection." Pet. App. 6a.[34] By

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[33] Cf. *United States* v. *FMC Corp.*, 572 F.2d 902, 906-907 (2d Cir. 1978) (rejecting defendants' contention that liability for a "take" under the Migratory Bird Treaty Act cannot be imposed for failure to act to prevent a chemical from escaping into a pond and killing birds); *Morissette* v. *United States*, 342 U.S. 246, 255 (1952) (public welfare offenses may encompass inaction where the law imposes a duty).

[34] In its statement upon denial of rehearing en banc, the panel majority expressed the view that if millions of acres are necessary to the survival of grizzly bears, then any material curtailment necessarily would involve death for members of the species. Pet. App. 91a. The majority also stated, however, that it did not endorse the specific claim of what acreage might actually be necessary for the grizzlies. *Id.* at 91a n.1. That qualification is significant, because it is unrealistic to assume that a prohibited taking could be found with respect to any and all habitat modification activities based on such evidence.

focusing only on extreme examples and the potential for unreasonably broad application of the regulation to specific species, the court of appeals failed to heed the limited nature of review accorded in a facial challenge.

The panel majority also cited the Special Rule Concerning Take of the Threatened Coastal California Gnatcatcher, published at 58 Fed. Reg. 65,088 (1993), as evidence that the "harm" regulation entails the Secretary's exercise of power over large tracts of land. Pet. App. 94a-95a. That reliance was misplaced, however, because the cited reference (58 Fed. Reg. 65,090 (1993)) is to a *state* planning process that encompasses 3.8 million acres. That area does not equate to gnatcatcher habitat, nor does the reference mean, as the panel majority suggested (Pet. App. 94a-95a), that the "take" prohibition would apply to all habitat modification activities within that area. FWS's issuance by special rule of an incidental take authorization for the gnatcatcher was largely the result of special circumstances in California whereby state law, the Natural Community Conservation Planning Act (NCCP), Cal. Fish & Game Code §§ 2800-2840 (West 1995), provides for a regional planning program for establishing systematic evaluation and restoration of the State's native habitats. The

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The inherent exaggeration of the regulation's impact based on that illustration is also reflected in the fact that the referenced 35 to 42 million-acre figure includes grizzly bear habitat in Canada. Rocky Barker, *Saving All The Parts: Reconciling Economics and the Endangered Species Act* 34-35 (Island Press 1993). And much of the habitat in the continental United States is federal, not private, land. *Id.* at 41. For example, only one percent of the land in the Greater Yellowstone Ecosystem, the largest bear habitat area in the continental United States, is private land. *Ibid.* Furthermore, the court of appeals failed to note that the cited source noted that grizzly bear numbers have continued to rise despite the shrinking of their habitat. *Id.* at 32. The author expressed concern, however, that the population increase will cause management complacency and that not enough is being done to ensure long-term survival. *Ibid.*

purpose of the NCCP program is to provide for regional protection and perpetuation of natural wildlife diversity (not limited to species listed under the ESA), while allowing compatible land use and appropriate development and growth. Because the state plan incorporates criteria that meet ESA incidental take permit standards (see 16 U.S.C. 1539(a)(2)), FWS, by its special rule, issued a blanket incidental take authorization for projects that comply with the criteria in the state plan. Thus, FWS's special rule effectively eliminates duplication of state, local and federal efforts and serves to reduce, rather than extend, federal involvement over the land included in the state planning process.

The majority's erroneous characterization of the import of the gnatcatcher plan also reflected a misunderstanding of conservation plan requirements under Section 10 of the ESA. Specifically, its concern about the breadth of the "harm" regulation failed to appreciate that Congress's creation of the Section 10 permit program adds flexibility to the "take" prohibition by enabling private owners' land uses to be accommodated in a way that protects listed species. By altogether removing private habitat modification and degradation that kills or injures protected wildlife from the reach of Section 9, the court of appeals' interpretation would upset the careful balance intended by Congress among the many competing interests of private landowners, governmental entities, and the purposes of the ESA.

3. In sum, the court of appeals erred when it invalidated the Secretary's interpretation of the statutory term "harm" based on an extravagant reading and speculative applications of the regulation. It thereby failed to respect both the limitations imposed by the Secretary's interpretation of his own regulation and the nature of a facial challenge to a regulation. Moreover, the Secretary's interpretation, unlike that of the court of appeals, furthers the object of the Act as a whole. The ESA is intended to be a powerful yet workable law

that accords substantial protection to listed species. Congress was aware that the greatest threat to listed species is the destruction of their natural habitat, see *TVA* v. *Hill*, 437 U.S. at 179, and the purposes of the Act include providing a means whereby the ecosystems upon which endangered and threatened species depend may be conserved. 16 U.S.C. 1531(b). The "harm" regulation furthers that purpose by interpreting the Act to bar significant habitat modification or degradation that actually kills or injures protected wildlife.

Furthermore, the Secretary's interpretation of "harm" dovetails with Congress's decision to temper the impact of the "take" prohibition on private land uses by enacting the 1982 amendments to allow the issuance of an incidental take permit in circumstances in which an acceptable habitat conservation plan has been prepared. The Section 10(a) process has resulted in the submission of more than 100 conservation plans and the approval of more than 30. See U.S. General Accounting Office, *Endangered Species Act: Information on Species Protection on Nonfederal Lands* at 9 (Dec. 1994). The first (and prototype) conservation plan was the plan, extensively discussed in the committee reports on the 1982 amendments, that was fashioned to protect listed butterflies in the context of habitat modification resulting from a housing development in California. See pages 35-36, *supra*; see also Pet. 23-25; note 4, *supra*. The interpretation of "take" and "harm" adopted by the court of appeals would substantially undermine such balanced and cooperative efforts to protect species while at the same time providing for development and productive land use.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

The Endangered Species Act of 1973, as amended and codified at 16 U.S.C. 1531 *et seq.*, provides in relevant part:

§ 1531. Congressional findings and declaration of purposes and policy

(a) Findings

The Congress finds and declares that—

(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

(3) these species of fish, wildlife, and plants are of esthetic [sic], ecological, educational, historical, recreational, and scientific value to the Nation and its people;

(4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to—

(A) migratory bird treaties with Canada and Mexico;

(B) the Migratory and Endangered Bird Treaty with Japan;

(C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;

(D) the International Convention for the Northwest Atlantic Fisheries;

(E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;

(F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and

(G) other international agreements; and

(5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.

(b) Purposes

The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of

such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

(c) Policy

(1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.

(2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.

* * * * *

§ 1533. Determination of endangered species and threatened species

(a) Generally

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) of this section determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

* * * * *

(3) The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable—

(A) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(B) may, from time-to-time thereafter as appropriate, revise such designation.

(b) Basis for determinations

(1)(A) The Secretary shall make determinations required by subsection (a) (1) of this section solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

(B) In carrying out this section, the Secretary shall give consideration to species which have been—

(i) designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement; or

(ii) identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish or wildlife or plants.

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a) (3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

* * * * *

(d) Protective regulations

Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a) (1) of this title, in the case of fish or wildlife, or section 1538(a) (2) of this title, in the case of plants, with respect to endangered species; except that with respect to the taking of resident species of fish or

wildlife, such regulations shall apply in any State which has entered into a cooperative agreement pursuant to section 1535(c) of this title only to the extent that such regulations have also been adopted by such State.

* * * * *

§ 1536. Interagency cooperation

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d) of this section.

(b) Opinion of Secretary

(1)(A) Consultation under subsection (a) (2) of this section with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

* * * * *

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or

its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a) (2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a) (3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a) (2) of this section, and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

(c) Biological assessment

(1) To facilitate compliance with the requirements of subsection (a) (2) of this section, each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed

within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

(d) Limitation on commitment of resources

After initiation of consultation required under subsection (a) (2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a) (2) of this section.

(e) Endangered Species Committee

(1) There is established a committee to be known as the Endangered Species Committee (hereinafter in this section referred to as the "Committee").

(2) The Committee shall review any application submitted to it pursuant to this section and determine in accordance with subsection (h) of this section whether or not to grant an exemption from the requirements of subsection (a) (2) of this section for the action set forth in such application.

* * * * *

(h) Grant of exemption

(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g) (5) of this section. The Committee shall grant an exemption from the requirements of subsection (a) (2) of this section for an agency action if, by a vote of not less than five of its members voting in person—

(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g) (4) of this section and on such other testimony or evidence as it may receive, that—

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

(iii) the action is of regional or national significance; and

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of Title 5.

(2)(A) Except as provided in subparagraph (B), an exemption for an agency action granted under paragraph (1) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action—

(i) regardless whether the species was identified in the biological assessment; and

(ii) only if a biological assessment has been conducted under subsection (c) of this section with respect to such agency action.

(B) An exemption shall be permanent under subparagraph (A) unless—

(i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction

of a species that was not the subject of consultation under subsection (a) (2) of this section or was not identified in any biological assessment conducted under subsection (c) of this section, and

(ii) the Committee determines within 60 days after the date of the Secretary's finding that the exemption should not be permanent.

If the Secretary makes a finding described in clause (i), the Committee shall meet with respect to the matter within 30 days after the date of the finding.

* * * * *

(*o*) Exemption as providing exception on taking of endangered species

Notwithstanding sections 1533(d) and 1538(a)(1)(B) and (C) of this title, sections 1371 and 1372 of this title, or any regulation promulgated to implement any such section—

(1) any action for which an exemption is granted under subsection (h) of this section shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and

(2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) of this section shall not be considered to be a prohibited taking of the species concerned.

* * * * *

§ 1538. Prohibited acts

(a) Generally

(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

(2) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of plants listed pursuant to section 1533 of

this title, it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from, the United States;

(B) remove and reduce to possession any such species from areas under Federal jurisdiction; maliciously damage or destroy any such species on any such area; or remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law;

(C) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(D) sell or offer for sale in interstate or foreign commerce any such species; or

(E) violate any regulation pertaining to such species or to any threatened species of plants listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

* * * * *

(g) Violations

It is unlawful for any person subject to the jurisdiction of the United States to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in this section.

§ 1539. Exceptions

(a) Permits

(1) The Secretary may permit, under such terms and conditions as he shall prescribe—

(A) any act otherwise prohibited by section 1538 of this title for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j) of this section; or

(B) any taking otherwise prohibited by section 1538(a) (1) (B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

(2)(A) No permit may be issued by the Secretary authorizing any taking referred to in paragraph (1) (B) unless the applicant therefor submits to the Secretary a conservation plan that specifies—

(i) the impact which will likely result from such taking;

(ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;

(iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and

(iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

(B) If the Secretary finds, after opportunity for public comment, with respect to a permit application and the related conservation plan that—

(i) the taking will be incidental;

(ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;

(iii) the applicant will ensure that adequate funding for the plan will be provided;

(iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and

(v) the measures, if any, required under subparagraph (A) (iv) will be met;

and he has received such other assurances as he may require that the plan will be implemented, the Secretary shall issue the permit. The permit shall contain such terms and conditions as the Secretary deems necessary or appropriate to carry out the purposes of this paragraph, including, but not limited to, such reporting requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with.

(C) The Secretary shall revoke a permit issued under this paragraph if he finds that the permittee is not complying with the terms and conditions of the permit.

* * * * *

(j) Experimental populations

(1) For purposes of this subsection, the term "experimental population" means any population

(including any offspring arising solely therefrom) authorized by the Secretary for release under paragraph (2), but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species.

(2)(A) The Secretary may authorize the release (and the related transportation) of any population (including eggs, propagules, or individuals) of an endangered species or a threatened species outside the current range of such species if the Secretary determines that such release will further the conservation of such species.

(B) Before authorizing the release of any population under subparagraph (A), the Secretary shall by regulation identify the population and determine, on the basis of the best available information, whether or not such population is essential to the continued existence of an endangered species or a threatened species.

(C) For the purposes of this chapter, each member of an experimental population shall be treated as a threatened species; except that—

(i) solely for purposes of section 1536 of this title (other than subsection (a) (1) thereof), an experimental population determined under subparagraph (B) to be not essential to the continued existence of a species shall be treated, except when it occurs in an area within the National Wildlife Refuge System or the National Park System, as a species proposed to be listed under section 1533 of this title; and

(ii) critical habitat shall not be designated under this chapter for any experimental population determined under subparagraph (B) to be not essential to the continued existence of a species.

(3) The Secretary, with respect to populations of endangered species or threatened species that the Secretary authorized, before October 13, 1982, for release in geographical areas separate from the other populations of such species, shall determine by regulation which of such populations are an experimental population for the purposes of this subsection and whether or not each is essential to the continued existence of an endangered species or a threatened species.

(13)

No. 94-859

Supreme Court, U.S.
FILED
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

BRUCE BABBITT, Secretary of the United States Department of the Interior, *et al.*,
Petitioners,

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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67 pp

QUESTION PRESENTED

Section 9(a)(1) of the Endangered Species Act of 1973, 16 U.S.C. § 1538(a)(1), makes it unlawful for any person to "take" an endangered fish or wildlife species. The Act defines "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19). By regulation, the U.S. Fish and Wildlife Service has defined "harm" in a way that focuses exclusively on the ultimate effect that any action has on a wildlife species; by its terms, it extends to ordinary land use activities ("habitat modifications"), like those engaged in by Respondents here, neither directed at wildlife nor directly injuring wildlife. 50 C.F.R. § 17.3. The question presented is:

> Whether the Fish and Wildlife Service's regulatory definition of "harm" represents a permissible expansion of liability under Endangered Species Act § 9(a)(1)?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-859

BRUCE BABBITT, Secretary of the United States Department of the Interior, *et al.*,
Petitioners,

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Endangered Species Act of 1973 as amended ("ESA" or "Act"), 16 U.S.C. §§ 1531-44, that are not in the Appendix to the Brief of Petitioners [1] ("Pet. Br.") are set forth in the Appendix to this brief.

[1] Petitioners, Secretary of the Interior Babbitt and Fish and Wildlife Service ("FWS") Director Beattie, are collectively referred to as "Petitioners" or "FWS." Respondents are collectively referred to as "Respondents" or "Sweet Home." The corporate Respondents (Erickson Busheling, Inc.; Ridgetree Logging Co.; Shotpouch Logging Co.) are privately held and have no parent or subsidiary companies. Respondents include all the parties iden-

STATEMENT

Congress did not intend the prohibition against "take" of protected wildlife, set forth in ESA § 9(a)(1), to encompass ordinary land use activities that are not directed at wildlife and do not directly injure protected wildlife.

The Statute. The ESA protects against two significant sources of species extinction: (1) the depletion of needed habitat, and (2) human predation. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 179 (1978) ("*TVA*"). The ESA targets the first source in §§ 5 and 7, and the second in § 9. 16 U.S.C. §§ 1534, 1536, and 1538.

ESA § 9(a)(1) prohibits commerce in or the taking of an endangered wildlife species.[2] *Id.* § 1538(a)(1). The provision specifically at issue here makes it "unlawful for any person subject to the jurisdiction of the United States to . . . take any such species". *Id.* § 1538(a)(1)(B). "Take" is defined in the Act. It means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19).

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tified by Petitioners except Betty Orem, who has sold her property and no longer wishes to be a party.

[2] ESA § 11 sets civil and criminal penalties for violations of the Act. An individual who has "knowingly" taken a listed species can be imprisoned for up to one year and fined up to $100,000 for each member taken. 16 U.S.C. § 1540(b); 18 U.S.C. §§ 3559, 3571. The lower courts have held that the "knowingly" standard of § 1540(b) requires only a general intent to perform an act, not a specific intent to violate the ESA. *E.g., United States v. Nguyen*, 916 F.2d 1016 (5th Cir. 1990). In addition, ESA § 11 authorizes governmental and citizen suits to enjoin violations. 16 U.S.C. § 1540(e)(6), (g)(1).

Although ESA § 9(a)(1) refers to *endangered* wildlife species, FWS has adopted a regulation extending the "take" prohibition to most *threatened* wildlife species. 50 C.F.R. § 17.31(a). ESA § 9(a)(1)(G) makes it unlawful for any person to "violate any [ESA] regulation." 16 U.S.C. § 1538(a)(1)(G).

The Regulation. FWS has elaborated upon the statutory definition by adopting a regulation that in turn defines "harm":

> *Harm* in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3. That regulatory definition sweeps within the "take" prohibition a host of activities that are not directed at wildlife and not ordinarily thought of as the taking of wildlife. Specifically, it includes "habitat modifications" that cause or contribute to some injury to a listed species [3] generally, for example by withdrawing some beneficial habitat from the species and thus "impairing essential behavioral patterns, including breeding, feeding or sheltering." The agency definition achieves this result by relying on the ultimate *effect* of an action; the nature of the action itself is not important. Thus, the regulation does *not* require that the prohibited action be directed at or against wildlife. Nor does it require any direct injury to some identifiable creature.[4]

Application of the Regulation. As written, the regulation reaches the use of land in furtherance of ordinary

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[3] "Listed species" is the common collective reference for endangered and threatened species.

[4] As Petitioners advised the court below, " 'harm' exists where there is proof that habitat modification alters essential behavioral patterns which then indirectly will cause death or injury (such as reproductive failures) to the species. . . ." Brief for Federal Appellees 47 (Nov. 25, 1992). The necessary proof "may consist . . . of measurable declines in the population of the animal." *Id. See* Brennan and Swanson, *Wildlife Protection on the Public Lands*, Public Land Law 7-21 (Rocky Mt. Min. L. Found. Sp. Inst. 1992) (FWS officials advising of "FWS position that habitat modification alone, without direct evidence of physical harm, can constitute a forbidden taking of listed species").

agricultural, silvicultural, housing, and similar objectives. FWS relies on the regulation to warn landowners that it considers certain land uses harmful to certain listed species (as by interferring with breeding or foraging patterns), and that engaging in such activities will subject the actor to agency enforcement.[5] As a practical matter, "persons whose extended conduct might be found a 'take,' and who thus are exposed to the criminal penalties . . . are under commanding pressure to comply" with FWS's view of "harm," either by forgoing such conduct or by applying for an incidental take permit.[6] Pet. App. 93a.

The scope and uses of the regulation are illustrated by FWS's "owl guidelines." Those guidelines describe what FWS considers "harm" to the northern spotted owl, a threatened species that is widely dispersed across forested lands in the Northwest. The guidelines state that timberland owners will be "subject to investigation" for prosecution under ESA § 9 if they do not preserve (forgo timber harvesting on) 1,000 to 3,960 acres around each spotted owl nest site.[7]

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[5] These warnings put landowners on "notice," of course, and thus facilitate criminal enforcement for a "knowing" violation of the Act.

[6] Under the 1982 ESA Amendments, FWS is authorized to permit actions that it would otherwise view as prohibited. 16 U.S.C. §§ 1536(b)(4), 1539(a). A person seeking an "incidental take permit" to use his or her land without fear of prosecution must agree to be bound by a "conservation plan" setting forth the permissible uses of that land. *Id.* § 1539(a).

[7] J.A. 42-44. *See* Sweet Home's Complaint ¶ 24, J.A. 25. The owl guidelines and other examples of FWS's application of its "harm" definition are discussed in Gidari, *The Endangered Species Act: Impact of Section 9 On Private Landowners*, 24 Envtl. L. 419, 426-43 (1994); Ruhl, *Regional Habitat Conservation Planning Under The Endangered Species Act: Pushing The Legal And Practical Limits Of Species Protection*, 44 Sw. L.J. 1393, 1409-19 (1991). FWS continues to follow the standards in the owl guidelines. *See* 60 Fed. Reg. 9486, 9491, 9496 (Feb. 17, 1995).

The Proceedings Below. Respondents are directly affected by the agency's "harm" regulation. They brought this action under ESA § 11(g) and the Administrative Procedure Act ("APA") to challenge it. *See* J.A. 17-26. As the district court summarized (Pet. App. 76a):

> Plaintiffs in this action are small landowners, small logging companies, and families allegedly dependent on the forest products industry in the Pacific Northwest and in the Southeast. In order to enforce the regulations at 50 C.F.R. § 17.3 and § 17.31(a) and to avoid "harm"-type takings of the northern spotted owl and other threatened wildlife species, the Fish and Wildlife Service ("FWS") has placed restrictions on timber harvesting. Plaintiffs claim that these restrictions have forced them to lay off employees, limited their income from trust lands, reduced the timber supply, and placed some of the plaintiffs in the position of being unable to support their families. They bring this action challenging the "harm" definition at 50 C.F.R. § 17.3 as contrary to the ESA.

The district court sustained the regulation. Pet. App. 77a-83a. The court of appeals reversed,[8] holding the "harm" regulation invalid in its effort to "embrace habitat modifications." Pet. App. 24a. The court concluded that the agency's definition was inconsistent with the statutory (and ordinary) meaning of "take," with the overall structure of the Act, and with its legislative history. Pet. App. 3a-10a.

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[8] Upon initial consideration, the panel voted to affirm. Pet. App. 46a. Judge Williams agreed with Judge Sentelle that the agency's "harm" regulation was irreconcilable with the 1973 Act, but he believed the ESA Amendments of 1982 had implicitly ratified the agency's interpretation. Pet. App. 67a-72a. He thus voted with Judge Mikva for affirmance; Judge Sentelle dissented. On Sweet Home's petition for rehearing, Judge Williams reconsidered his earlier views on the effect of the 1982 Amendments, concluding that they had *not* altered the 1973 Act in any relevant respect. Pet. App. 10a-24a. He authored the 2-1 majority opinion.

Judge Sentelle concurred, emphasizing that the language and structure of the Act precluded the agency's interpretation, without resort to legislative history. He found himself unable to "cram the agency's huge regulatory definition" into the "tiny crack of ambiguity" created by including "harm" with the nine other terms in the statutory definition of "take." Pet. App. 26a.

Judge Mikva dissented. He found "the legislative history to be most ambiguous," Pet. App. 34a, and concluded that the deference owed the agency interpretation under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), required the regulation to be sustained. Pet. App. 40a-41a.

On August 12, 1994, the court of appeals denied Petitioners' request for rehearing *en banc*. Pet. App. 89a-99a. Judge Williams' opinion filed that day summarizes how the "harm" regulation exceeds statutory limits:

> [T]he statute, fairly read in light of the "traditional tools of statutory interpretation," manifests a clear determination by Congress that the prohibitions of [ESA] § 9 should not reach habitat modifications as defined by the Department [of the Interior], where there is no direct action by the defendant against any member of the species. Extending the word "harm" to reach habitat modification as so conceived carries § 9's prohibition far beyond the reach effected by all the other terms used in the definition; it applies to every citizen duties the Act expressly imposed only on federal government agencies; and it ignores the plausible inferences from the Senate's deletion of the phrase "habitat modification" from the draft bill.

Pet. App. 95a-96a.

This Court granted certiorari on January 6, 1995.

SUMMARY OF ARGUMENT

The prohibition against "take" of listed wildlife set forth in ESA § 9, 16 U.S.C. § 1538, cannot fairly be read to bar ordinary uses of land. Yet FWS has seized on the elastic word "harm," one of ten verbs within the statutory definition of "take," to expand the reach of ESA § 9 in just that way. FWS defines "harm" to forbid any "habitat modification" if its ultimate effect is to injure a listed species, even by reducing the reproductive success of a species member. *See* note 4, *supra*. By looking exclusively to ultimate effect, and disregarding the character of the conduct sought to be prohibited, FWS's regulation reaches many normal activities that are not directed at wildlife and cause no concrete injury to listed wildlife. That effort is irreconcilable with the Act as written.

The words Congress used to describe what it sought to prohibit reveal adherence to the traditional concept of a wildlife "take." They reflect Congress' desire to stop all forms of human predation on protected species. As enacted by Congress, the "take" prohibition evokes purposeful efforts to injure or capture wildlife; the direct application of force to, or physical intrusions on, specific creatures; direct and concrete injury to identifiable animals; and actions which a specifically acting human does to a specific creature. Whatever elasticity "harm"' may have in other contexts, its use as one of ten descriptors of wildlife "take" will not allow it to reach "habitat modifications" that unintentionally deprive listed wildlife of some environmental benefit. The expansion of ESA § 9 to reach and potentially criminalize ordinary actions of ordinary citizens cannot be hung on so "small a nail" (Pet. App. 96a) as the unelaborated and unhighlighted use of "harm," a word added to nine existing words in the reported definition of "take" by "technical amendment" on the Senate floor.

Petitioners are correct that Congress was concerned with the need to preserve vital habitat for endangered

species. The structure of the Act confirms, however, that Congress addressed that concern through other provisions. Those provisions, which impose special duties on the federal government, would be rendered meaningless or inconsequential if Petitioners' view of "harm" were accepted. The intent of the Congress that enacted ESA § 9 cannot be found in amendments that subsequent Congresses did not adopt or made to other provisions of the Act. Nor can Petitioners' policy arguments overcome the text and structure of the Act.

ARGUMENT

I. FWS'S EXPANSIVE DEFINITION OF "HARM" IS NOT CONSISTENT WITH THE LANGUAGE, STRUCTURE, OR HISTORY OF THE ACT

A. The Issue Presented

The agency's aggressive interpretation of "harm" (and therefore of "take" as used in the operative portions of the Act) broadly expands the prohibitions of ESA § 9, creating FWS authority over any number of private land uses. As Petitioners make clear, FWS's gloss on the word "harm" is important because it, and it alone, renders unlawful an extraordinarily broad class of seemingly lawful activities—private land use activities indirectly affecting listed wildlife, but in no respect directed at wildlife or directly injuring specific animals. These activities would otherwise be beyond the "take" prohibition and, indeed, beyond the regulatory scope of the Act. "Harm" is thus the "hook" upon which FWS hangs a pervasive constraint on the use of private land.

Under FWS's definition, effects on listed wildlife *alone* are sufficient to render a person's actions unlawful. This is clearly expressed in the regulation: "habitat modification . . . where it actually kills or injuries wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." [9]

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[9] 50 C.F.R. § 17.3. As Petitioners explain, FWS does *not* limit "actual injury" to physical injury to an identifiable animal. *See*

The court below held that this regulatory definition carries "take" and "harm," as used in the Act, too far. When read in its statutory context, "take" necessarily involves action directed at wildlife. It thus cannot be stretched to cover the types of ordinary land use activities of concern to Respondents, such as cutting trees, clearing brush, or constructing or maintaining roads.

In so concluding, the court below recognized, and we concede, that the word "harm," wrenched from its context and considered abstractly, is a word of extraordinary elasticity, arguably capable of the meaning FWS attributes to it. *See* Pet. App. 3a-4a, Pet. Br. at 20-21. "Harm" can be used to refer to any sort of action that produces any sort of negative effect on a person or thing. It is sometimes even used to refer to actions or inactions that deprive some person or thing of some needed benefit (*e.g.*,

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Pet. Br. at 6-7, 45; note 4, *supra*. The uncertainty in evaluating whether a given "habitat modification" will "significantly" impair the "essential behavioral patterns" of a particular species adds to the regulation's force as a land use constraint. Through general and specific warnings to private landowners that ordinary uses of their lands would subject them to "take" investigations, FWS effectively uses a threat of criminal sanctions to chill a great many land use activities that *might or might not* cause actual injury or death.

In addition, FWS has threatened state and local officials with prosecution for "harm" if they approve a permit and the permittee's actions "harm" listed wildlife. Rather than risk liability, these officials often apply FWS's view of "harm" as a limit on their permitting authority, thereby further constraining private land uses. *See* Gidari, 24 Envtl. L. at 432-36; Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, And The Like—Should Federal Agencies Use Them To Bind The Public?*, 41 Duke L.J. 1311, 1366-71 (1992); Thornton, *Takings under Endangered Species Act Section 9*, 4 Nat. Resources & Env't 7, 51 (Spring 1990) (local officials "listen when told they may go to jail for issuing a grading permit"). Thus, the "harm" regulation broadly constrains land uses. *See* Arnold, *Conserving Habitats and Building Habitats: The Emerging Impact of the Endangered Species Act on Land Use Development*, 10 Stan. Envt'l L. J. 1, 30-36 (1991).

a hospitable habitat), thereby "harming" that person or thing.

Yet the word is generally and most comfortably used in reference to purposeful efforts to injure.[10] The command, "Don't harm that child!", for example, would not naturally be thought of as a directive to restrict the child's television-watching or candy intake, even though either in excess would cause the child "harm." In active voice, or in a prohibitory sense—as in ESA §§ 3(19) and 9(a)(1)—"harm" is commonly understood to convey a sense of purposeful effort and direct, concrete injury.

But the meaning of the ESA term "harm" need not and cannot be judged in the abstract. As in virtually every case of statutory construction, its meaning must be determined by its use in context.[11] *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (the "meaning of statutory language, . . . depends on context"). If Congress' intent is discernible from the statutory language and its context, the statute's structure, and principles of statutory con-

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[10] *See* J. Opdycke, *Mark My Words: A Guide to Modern Usage and Expression* 330 (1949) ("[H]urt connotes pain as a rule, as a hurt to a hand or a paw or a hoof, or to a name or a reputation or a trade. Like *harm*, it is almost as broad in connotation as *injury* itself. But harm has in it a little of the idea of specially focused hurt or injury, as if a personal injury has been anticipated and intended") (emphasis added); G. Crabb, *Crabb's English Synonymes* 449 (1917) ("*Harm* and *mischief* are as general in their application as *injury*, and comprehend what is physically as well as morally bad, but they are more particularly applicable to what is done intentionally by the person") (emphasis added).

[11] This proposition is equally true in discerning the meaning of language generally. *See Webster's Third New International Dictionary of the English Language—Unabridged* (1971) at 19a ("The best sense is the one that most aptly fits the context"); McArthur, *The Oxford Companion to the English Language* 33 (1971) (Although most common English words have multiple meanings, "when a native user of English encounters [a word] there is rarely any ambiguity, because the context is usually clear").

struction, that is the end of the matter. *INS v. Cardoza-Fonseca,* 480 U.S. 421, 446-49 (1987). Where Congress' intent can be discerned, no deference is owed under *Chevron* to an inconsistent interpretation that the agency regards as more felicitous.[12]

It is only when Congress' intent is not fairly discernible from "the text and reasonable inferences from it," *Brown,* 115 S.Ct. at 556, that the Court must proceed to the second step of the *Chevron* analysis. The question at that point is whether the agency interpretation is "reasonable in light of the legislature's revealed design." *Nationsbank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.,* —— U.S. ——, 115 S.Ct. 810, 813-14 (1995).

Here, Congress' intent is discernible and precludes the "harm" regulation under the first *Chevron* inquiry. But even if it were not, Petitioners' reading is fundamentally inconsistent with Congress' revealed design, and thus unreasonable under *Chevron*'s second step.

The analysis below follows a series of widening concentric circles, proceeding (1) from the words used with "harm" in the statutory definition; (2) to the defined term "take" itself; (3) to the way "take" is used in the Act generally and in similar legislation; (4) to the structure of the Act as a whole; (5) to the other, nontextual principles of construction which provide guidance in construing statutes; and, finally, (6) to the legislative process and legislative history.

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[12] Contrary to Petitioners' suggestion (at 30), the agency's interpretation receives no judicial deference during the first step of *Chevron. E.g., Brown v. Gardner,* —— U.S. ——, 115 S.Ct. 552, 557 (1994); *Demarest v. Manspeaker,* 498 U.S. 184, 190-91 (1991); *Chevron,* 467 U.S. at 843 n.9.

B. The Agency's Attempt to Define "Harm" and "Take" to Encompass Habitat Modification Actions Affecting Wildlife, But Not Directed at Wildlife, Is Inconsistent With the Statutory Text

The ESA makes it "unlawful for any person . . . to . . . take" endangered wildlife. 16 U.S.C. § 1538(a)(1)(B). "Take" is defined in the Act, and the word "harm" appears within the statutory definition: " 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19). We focus first upon this statutory definition and the inferences to be drawn from the way "harm" is used within it.

1. *"Harm"*

a. Because "harm" is an indefinite word in a list containing words that are more definite, two established canons of construction are helpful. The first is the maxim *"noscitur a sociis,* that a word is known by the company it keeps." *Jarecki v. G.D. Searle & Co.,* 367 U.S. 303, 307 (1961). That principle is "often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Id.* This Court has frequently applied that principle (or something closely akin to it) in interpreting statutes because it provides one of the surest means of discerning the sense in which a statutory term has been used.[13] A second, related canon is *"ejusdem generis*—that a general statutory term should be understood in light of the specific terms that surround it"—so that the general word is understood to include only "categories similar in type to those specifically enumerated." [14]

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[13] *E.g., Gustafson v. Alloyd Co.,* —— U.S. ——, 115 S.Ct. 1061, 1069-70 (1995); *Brown,* 115 S.Ct. at 555; *Beecham v. United States,* —— U.S. ——, 114 S.Ct. 1669, 1671 (1994); *Dole v. United Steelworkers of America,* 494 U.S. 26, 36 (1990); *Massachusetts v. Morash,* 490 U.S. 107, 114-15 (1989).

[14] *Hughey v. United States,* 495 U.S. 411, 419 (1990); *see Holder v. Hall,* —— U.S. ——, 114 S.Ct. 2581, 2604 (1994) (con-

It is not difficult to identify the common threads that run through the nine verbs accompanying the word "harm" in the statutory definition of "take." Each of these terms—"to harass, . . . pursue, hunt, shoot, wound, kill, trap, capture, or collect" wildlife—involves action directed at the wildlife object, rather than merely affecting that object.[15] They are all active words, suggesting purposeful conduct directed at some living thing. All "involve a substantially direct application of force, which the Service's" definition lacks altogether. Pet. App. 5a-6a. And all describe actions concretely affecting individual members of a species; they do not suggest actions more tenuously affecting the vitality of the species as a whole (*e.g.*, effects on the reproductive success rate). *See* note 4, *supra.*

In sum, each of the nine words accompanying "harm" is fully consistent with a comprehensive prohibition on the taking or attempted taking of wildlife, as taking is commonly used (*see* pages 19-22, *infra*). Looked at individually, and as a whole, those words reflect an effort to ban hunting and other forms of predation directed at listed

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curing opinion); *Breininger v. Sheet Metal Workers Int'l Ass'n Local 6*, 493 U.S. 67, 91-92 (1989). Petitioners also invoke *ejusdem generis*, agreeing that "harm" should be regarded as a general term whose meaning is guided by the common elements of the words that follow. Pet. Br. at 23. The problem for Petitioners, however, is that *ejusdem generis* undermines their broad, effect-driven definition, because the other words all imply efforts to *cause* hurt or injury to specific animals.

[15] All of the terms, except perhaps "kill," can be faily used *only* to describe action specifically directed at an object. When "kill" is used in active voice, or prohibitory sense ("Thou shall not kill"), it too connotes intentional and directed conduct. Here, the operative language of ESA § 9 is phrased in a present, active, and prohibitory sense. It would stretch "kill" beyond its ESA limits to use it to encompass everyday actions merely because they ultimately result in death. "Kill" is not synonymous with death. *See United States v. FMC Corp.*, 572 F.2d 902, 905 (2d Cir. 1978) (it "would offend reason and common sense" to find that wildlife "take" includes "deaths caused by automobiles").

wildlife. None implies the prohibition of an ordinary act, not directed against wildlife, that may generally deprive a species of some advantage (in the form of a preferred habitat) that it might otherwise enjoy.

The other terms used in the statutory "take" definition are thus far removed from the agency's "harm" regulation and the paradigm of habitat modification set forth in its second sentence. Unlike the verbs that are "harm's" neighbors in the statute, the agency's definition is not limited by the character of the conduct (whether the action is directed at wildlife), or even by the relationship between the actor and the consequences of the act (direct and immediate). Instead, it focuses exclusively on the ultimate effect of the act on listed wildlife. This confuses some remote effect on a species' population with a concrete effect on some member of that species (as is evoked by all the other terms within the definition). It also ignores the role of intervening acts in bringing about that generalized effect. It thus inflates the definition of "take" far beyond that which a specificaly acting human *does to* an identifiable member of some species.

Applying the *noscitur a sociis* principle, Judge Sentelle expressed the point this way:

> In the present statute, all the other terms among which "harm" finds itself keeping company relate to *an act which a specifically acting human does to a specific individual representative of a wildlife species.* In fact, they are the sorts of things an individual human commonly does when he intends to "take" an animal. Otherwise put, if I were intent on taking a rabbit, a squirrel, or a deer, as the term "take" is used in common English parlance, I would go forth with my dogs or my guns or my snares and proceed to "harass . . . pursue, hunt, shoot, wound, kill, trap, capture, or collect" one of the target species. 16 U.S.C. § 1532(19). If I succeeded in that endeavor, I would certainly have

> "taken" the beast. If I failed, I would at least have "attempt[ed] to engage in . . . such conduct." *Id.*

Pet. App. 70a (emphasis added).

Although Petitioners (at 21-23) appear to criticize the use of contextual canons, such as *noscitur a sociis,* it is plain that one must look *somewhere* to divine the sense in which an undebated, unelaborated and highly elastic term like "harm" is being used.[16] The natural place to start is with its companion words in the statute. *Third Nat'l Bank of Nashville v. Impac Ltd.*, 432 U.S. 312, 322 and n.16 (1977) ("one hardly need rely on such Latin phrases as *ejusdem generis* and *noscitur a sociis* to reach this obvious conclusion" that "words grouped in a list should be given related meaning"). Because "harm" is "capable of many meanings," the context-based canons are "wisely applied . . . to avoid the giving of unintended breadth" to the term. *Jarecki,* 367 U.S. at 307.

Petitioners themselves have agreed on another occasion. In an Interior Department legal opinion, published in 1981, they analyzed the ESA meaning of "harm." Petitioners there concluded that under the *ejusdem generis* principle, " 'harm' should be interpreted to include only those actions that are directed against, and likely to injure or kill, individual wildlife." [17]

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[16] There is no specific legislative history on "harm." The term was added as part of a package of 24 undebated "technical" floor amendments. *See* page 34, *infra.*

[17] 46 Fed. Reg. 29,491 (June 2, 1981) (J.A. 58). Similarly, the Ninth Circuit recently applied the "familiar principle . . . that words grouped in a list should be given related meaning" to construe the term "harass" and other forms of "take" under the Marine Mammal Protection Act of 1972 ("MMPA"). *United States v. Hayashi,* 22 F.3d 859, 864 (9th Cir. 1994). Concluding that those terms all involved "direct intrusions," the court refused to read "take" as extending far beyond the legislative focus on animals that "have been blown up, clubbed to death, run down by boats, [or] poisoned" to include the ordinary activities of private fishermen. *Id.* at 864 n.12.

Petitioners (at 27) argue that the court of appeals' description of all the other "take" terms as involving the "direct application of physical force" is undermined by the inclusion of "harass" and the example in the House Report of birdwatching as harassment (quoted at pages 34-35, *infra*). The argument is fundamentally misconceived. Petitioners are of course correct that "take" does *not* turn on "physical blows to the body" (Pet. Br. at 27), or any other actual physical touching. But the problems with FWS's definition and its focus on habitat modification lie elsewhere. It is the absence of activity directed at wildlife, of direct intrusion and concrete effect, that renders the definition untenable. "Harass" necessarily encompasses those elements.[18] It is, like the other words within the definition, an act which a "specifically acting human does to a specific individual representative of a wildlife species." Pet. App. 70a.

The birdwatching-as-harassment example that Petitioners take from the 1973 House Report highlights what is lacking in the agency's "harm" definition. However benign the birdwatchers' motives,[19] the "excessive birdwatch-

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[18] The first meaning of "harass" is "to lay waste" or "to worry and impede by repeated attacks." *Webster's Third New International Dictionary Of The English Language-Unabridged* 1031 (1971). All of the meanings of "harass" incorporate the elements of purposeful action and intrusion. *See id.* Similarly, the first meaning of "pursue", which FWS also claims (at 23) is "broader" than the other terms in the Act's definition, is "to follow with enmity" or to follow "determinedly in order to overtake, capture, kill or defeat." *Id.* at 1848. These words are thus entirely consistent with Congress' intent in ESA § 3(19) to reach all forms of "take" or "attempts to take" listed wildlife, as "take" is commonly understood. *See* pages 18-22, *infra*.

[19] Petitioners suggest the image of a lone figure quietly observing birds from afar. But birdwatching often is not so benign. *See, e.g., Using Bird Tapes*, BIRDING, June 1992, at 168 ("sheer numbers of birdwatchers" cause certain birds to "face serious disruption"); *id.* at 168-73 (discussing common practice of using tapes to bring birds into view, a practice that pulls them from

ing" example assuredly involves physically intrusive action directed at wildlife. The conduct could not fairly be described as "harassment" without (1) the element of action directed at the object, and (2) the element of direct physical intrusion on particular birds. The "harm" regulation goes well beyond these limiting principles in prohibiting ordinary land uses (and other actions) merely on the basis of their ultimate effect on the species.

b. As Judge Sentelle pointed out below, the term "harm," as construed by FWS to focus solely on the ultimate *effect* on the species, makes superfluous all the other words in the statutory "take" definition. Pet. App. 25a and 71a-72a; *see NLRB v. Health Care & Retirement Corp.*, —— U.S. ——, 114 S.Ct. 1778, 1783 (1994) (rejecting interpretation which "renders portions of the statutory definition . . . meaningless"). Limited as the court of appeals suggested, however, the term fills a statutory gap designed to encompass the purposeful infliction of injury by means other than (for example) shooting or wounding.[20]

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their nests and normal activities and severely agitates territorial birds); *Yellow Rails, Birding Ethics, and the Law*, BIRDING, Dec. 1989, at 305 (describing 70 birdwatchers "tromp[ing] through a fragile marsh . . . to surround the Yellow Rail, close in on it, and catch it by hand"); *id.* at 306 (letter from FWS agent describing how people wanting to see a Whooping Crane "were pulling up in vehicles and flashing their headlights on the bird as it roosted," causing it to "repeatedly flush from the roost").

[20] Petitioners' argument to avoid surplusage (Pet. Br. 23) is difficult to comprehend. It seems to be that by defining "harm" to encompass the other words in the definition *and* any other ways to inflict injury, surplusage is somehow eliminated. *Id.* But the language of the Act does not hint at any such intended breadth. For example, the Act does not make it unlawful "to harass, shoot, wound, kill, pursue, capture or *harm in any (other) way*." "Harm" is merely one of the several words in the list, indistinct from the others as to dignity or emphasis. *See Gustafson*, 115 S.Ct. at 1069 (narrowly construing "communication," which "is but one word in a list").

c. The ESA's "take" definition also encompasses the "attempt to engage in any such conduct." The reference to "attempt" confirms that purposeful activity is what Congress had in mind.[21] It is impossible to apply the concept of "attempt" to the notion of "harm" sponsored by Petitioners. That is, it is linguistically comfortable to speak of an attempt to harass, attempt to kill, attempt to hunt, attempt to pursue, attempt to shoot, attempt to wound, attempt to trap, attempt to capture, attempt to collect, or indeed, attempt to harm—but only if "harm" refers to some purposeful effort to injure wildlife.

2. *"Take"*

a. Petitioners (at 27-28) rely heavily on the statements from the Senate and House Reports to the effect that " 'Take' is defined . . . in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." [22] S. Rep. No. 307, 93d Cong., 1st Sess. 7 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2995. Petitioners' reliance on such statements highlights a fundamental point. While much attention has focused on the meaning of "harm," the *operative* statutory term is "take." It is the "take" of listed wildlife, as defined in the ESA, that § 9 forbids.

Congress is, of course, free to give any word it uses a wholly arbitrary meaning. But the presumption must be that Congress was using the word in at least one of its ordinary senses, and the term should be construed in a

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[21] An "attempt to harass or harm" wildlife under the ESA means that the activity's "purposes" are directed at wildlife. *Sierra Club v. Froehlke*, 534 F.2d 1289, 1302, 1304 (8th Cir. 1976).

[22] This circular formulation is ineffectual to support the point Petitioners hope to make. At the time this statement was made, "harm" was not included in the "take" definition. *See* pages 34-35, *infra*.

way that is faithful to that core meaning.[23] In other words, it is one thing to give "take" its broadest possible meaning; it is quite another thing to give it an *impossible* one—a meaning that cannot be reconciled with conventional usage.

"Take" has an established meaning, as does the familiar concept of a "wildlife take." The dictionary definitions consistently convey the sense of purpose, the effort to exercise dominion over some creature, and the concrete effect of that creature.[24] Judge Sentelle aptly explained how Petitioners' approach is inconsistent with the established meaning of "take":

> I see no reasonable way that the term "take" can be defined to include "significant habitat modification or degradation" as it is defined in 50 C.F.R. § 17.3. I have in my time seen a great many farm-

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[23] *E.g.*, *Hayashi*, 22 F.3d at 864 (construing "harass" to "comport[] with a common understanding of the term 'take,' of which 'harass' is simply one form").

[24] "Take" means:

> 1. to get into one's hands, possession, control, etc., by force or artifice . . . 2. to seize or capture . . . 3. to catch or get (fish, game, etc.), esp. by killing . . . 4. to hold, grasp, or grip . . . 5. to get into one's hold or possession by voluntary action.

The Random House Dictionary of the English Language-The Unabridged Edition 1448 (1971).

> I 1. To touch . . . II. To seize, grasp, capture, catch, and related senses. 2. To lay hold upon, get into one's hands by force or artifice . . . b. To catch, capture (a wild beast, bird, fish, etc.); also of an animal, to seize or catch (prey).

Compact Edition of the Oxford English Dictionary 3223 (1971).

> 1: to get into one's hands or into one's possession, power, or control by force or stratagem, as a: to seize or capture physically . . . b (1): to get possession of (as fish or game) by killing or capturing . . . sometimes used to include acts in attempt to kill or capture . . . (2): to seize as prey.

Webster's Third New International Dictionary of the English Language-Unabridged 2329-30 (1971).

> ers modifying habitat. They modify by plowing, by tilling, by clearing, and in a thousand other ways. At no point when I have seen a farmer so engaged has it occurred to me that he is taking game. Nor do I think it would occur to anyone else that he was taking wildlife. He may be doing something harmful to wildlife, but he is not "taking" it.

Pet. App. 69a.

b. FWS's "harm" definition is also inconsistent with ESA § 9 generally, with the way "take" is used throughout the 1973 ESA, and with the use of wildlife "take" in similar statutes.

First, all of the prohibited acts in ESA § 9(a)(1) (*e.g.*, "import any such species," "take any such species," "possess, sell, deliver, carry, transport, or ship" any such species) refer to conduct that a specifically acting person engages in with respect to specific wildlife. 16 U.S.C. § 1538(a)(1). The focus of the provision is on the *purposeful* abuse and transportation of *individual specimens* of listed wildlife.

Second, "take" is used frequently in the Act, but not in a manner broad enough to house the meaning Petitioners attempt to give it in their "harm" definition. For example, ESA § 10(e) (addressing subsistence takings by Alaska Natives) refers to "byproducts of species *taken* pursuant to this section." 16 U.S.C. § 1539(e). ESA § 3(3) specifies "regulated *taking*" as a conservation measure that may be employed to relieve population pressures. *Id.* § 1532(3). ESA § 9(a)(1)(D) outlaws certain commercial transactions involving "species *taken* in violation" of the Act. *Id.* § 1538(a)(1)(D). And ESA § 11(e) provides for the forfeiture of instrumentalities used in a taking—the "guns, traps, nets, and other equipment, vessels, vehicles, aircraft, and other means of transportation used to aid the *taking*, possessing, selling." *Id.* § 1540(e)(4)(B). Substituting FWS's "harm"

definition for "take" in each of those statutory provisions would make the provisions nonsensical.

Finally, wildlife "take" has long been used in this sense of purposeful action against wildlife. *See* dictionary definitions in note 24, *supra*. The Migratory Bird Treaty Act ("MBTA"), as amended through 1989, makes it "unlawful at any time, *by any means or in any manner*, to pursue, hunt, take, capture, kill, attempt to take . . . any migratory bird [or] any part, nest or egg of any such bird." 16 U.S.C. § 703 (emphasis added). Even with the highlighted language, "take" under the MBTA is interpreted to mean "physical conduct of the sort engaged in by hunters and poachers." *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 302 (9th Cir. 1991). Notwithstanding the MBTA's broad language, "take" simply does not reach ordinary land uses: "habitat destruction, leading indirectly to bird deaths . . . . does not 'take' them within the meaning of the MBTA." [25]

Under the MBTA, therefore, "take" is understood to involve actions directed at wildlife.[26] It does not reach "deaths caused by automobiles" and other everyday activities. *FMC Corp.*, 572 F.2d at 905. Similarly, "take"

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[25] 952 F.2d at 303. The *Evans* opinion attempts to contrast the MBTA with the ESA, stating in *dicta* that "[h]abitat destruction causes 'harm' to the owls under the ESA." *Id.* To the extent the *Evans dicta* drew upon FWS's regulatory definition of "harm," the opinion is correct. But as a statutory matter, the contrast is not persuasive. Since the MBTA contains a *statutory* directive that "take" be construed as broadly as possible, "take" under the MBTA is no less expansive than it is under the ESA.

[26] As Petitioners point out (at 26 n.12), "take" has been found under the MBTA when protected birds were killed by toxic pesticides. *See FMC Corp.*, 572 F.2d 902. The manufacture and use of pesticides, however, are actions directed at killing animals. Like trapping or fishing, they may have the unintended effect of incidentally "taking" a listed species. But this would hardly extend the concept of "take" to ordinary activities not in the nature of killing, capturing, *etc.*

under the MMPA "must entail a . . . direct intrusion" against an animal. *Hayashi*, 22 F.3d at 864 (fisherman's firing a rifle near, not at, a protected porpoise was not a "take").

C. The Structure of the Act Further Undermines FWS's "Harm" Regulation

1. The basic structure of the 1973 ESA belies Petitioners' theory of "harm." It is difficult to believe that Congress extended the reach of the ESA to ordinary land uses by adding the word "harm," without elaboration, to nine other verbs, in the course of defining a "take" prohibition that, on its face and in context, seemed to prohibit predatory actions directed at listed wildlife.

If Congress had intended to reach land use under ESA § 9, it would have addressed the matter forthrightly. If Congress had meant "harm" to have such significance, it would have made the *operative* term in the statute "harm" instead of "take"—or found some other way to highlight ESA § 9's intended breadth. *See, e.g.*, note 20, *supra*. Instead, Congress cast the section more narrowly, as a prohibition on "take," and quietly placed the word "harm" in a list alongside nine other terms in the definitional section.

2. Congress was well aware that habitat destruction was the greatest threat to species extinction. *See TVA*, 437 U.S. at 179. The absence of any reference to habitat modification in ESA § 9 is therefore all the more significant, because it underscores the choice that Congress made to address that threat through other provisions of the Act.[27] The statutory structure shows that Congress

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[27] FWS resists that choice, emphasizing (at 4, 18, 24) the ESA § 2(b) statement that the "purposes of this chapter are to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved, [and] to provide a program for the conservation of such" species. 16 U.S.C. § 1531(b). This is, of course, true, but it proves nothing. The

perceived habitat destruction and human predation to be separate threats which the ESA would address in different ways.[28]

3. As Petitioners acknowledge (at 8-9, 24), the 1973 ESA explicitly addressed the habitat destruction problem in §§ 5 and 7.[29] Each is directed to and imposes specific duties on the federal sector. Under ESA § 5, FWS "shall establish and implement a program to conserve" listed wildlife and "shall" do so by using its "land acquisition" authority. 16 U.S.C. § 1534(b). And under ESA § 7, every federal agency "shall" carry out programs for the conservation of listed species. *Id.* § 1536(a)(1). In addition, every federal agency:

> shall . . . insure that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence of any [listed] species *or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical.*

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very next provision and ESA § 7(a)(1) assign the duty to conserve to *federal agencies. Id.* §§ 1531(c)(1), 1536(a)(1); *see TVA*, 437 U.S. at 180. As Petitioners said in their *amicus* brief to the Ninth Circuit in *Palila v. Hawaii Dep't of Land and Natural Resources*, 852 F.2d 1106 (9th Cir. 1988), "[r]eliance on this broad statement of purpose [in § 1531(b)] cannot overcome . . . the limitations of the specific language Congress has chosen in Section 9 of the Act. . . . The responsibility to conserve, as defined in the Act, is specifically directed to federal agencies and activities, and not to the other persons and entities that are subject to the civil and criminal penalties of the Act." Dist. Ct. Docket Entry 8, Ex. 5 at 20.

[28] By expressly addressing habitat modification in ESA § 7 but not in ESA § 9, Congress must be presumed to have acted "purposely in the . . . exclusion," *i.e.*, as not intending to reach habitat modification under ESA § 9. *Keene Corp. v. United States*, —— U.S. ——, 113 S. Ct. 2035, 2040 (1993).

[29] *See TVA*, 437 U.S. at 179 and n.24 ("[v]irtually every bill introduced in Congress during the 1973 session responded to this [habitat destruction] concern by incorporating language similar, if not identical, to that found in the present § 7 of the Act").

Id. § 1536(a)(2) (emphasis added). This extends the federal duty to every proposed project on private or state lands that involves federal funding or requires a federal permit.

4. ESA § 9, in contrast, directly applies to private and other non-federal landowners as well as the federal sector. By terms, it imposes *no* habitat conservation duty. It simply tells citizens that they cannot "take" listed species. *Id.* § 1538(a)(1)(B). "Thus," the court below found, "on a specific segment of society, the federal government, the Act imposes very broad burdens, including the avoidance of adverse habitat modifications; on a broad segment, every person, it imposes relatively narrow ones." Pet. App. 7a-8a.

5. By its application to ordinary land uses (*i.e.*, habitat modifications), FWS's "harm" regulation turns this statutory scheme on its head, making the federal duties under ESA §§ 5 and 7 redundant and meaningless. There is little incentive for FWS to buy needed habitat (or conservation easements) from private landowners, in order to protect such habitat, if ESA § 9 is read to bar the destruction of any habitat that "harms" listed species.[30] The result, of course, is to bleed ESA § 5 of all meaning.[31]

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[30] ESA § 5 provided funds to acquire critical habitat because landowners "are understandably unwilling to [provide habitat benefits for listed species] at excessive costs to themselves." 119 Cong. Rec. 30,162 (Sept. 18, 1973) (remarks of House floor manager Sullivan). Thus, contrary to Petitioners' surmise (at 21) that there is "no reason why Congress would have" excluded "destruction of habitat" from "take," the legislative history confirms that it did so to respect the prerogatives of private property owners. A similar manifestation of Congress' intent to reach the non-federal sector through incentives, rather than compulsion, is embodied in ESA § 6, which encourages (but does not coerce) States to assist in achieving ESA objectives by providing "financial assistance to any State" which enters into a "cooperative agreement." 16 U.S.C. § 1535(c) and (d).

[31] *Amici* Cairns, *et al.*, point out that the government spent only $253 million between 1967 and 1993 to acquire land for listed

Moreover, if ESA § 9 already prohibits *anyone* from modifying *any* habitat to the detriment of even *one member* of a listed wildlife species, then ESA § 7(a)(2)'s specific prohibition on "adverse modifications of habitat" (as applied to federal lands and federally-authorized actions) becomes surplusage.[32] Similarly, if *everyone* has a duty under ESA § 9 to avoid inadvertently injuring even *one member* of a listed species, there is nothing left of the separate federal duty under ESA § 7(a)(2) to avoid actions that "jeopardize the continued existence" of the species.

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species protection. Cairns Br. at 18. That is a small fraction of the amount that Congress has authorized for appropriation from the Land and Water Conservation Fund, which is currently running $900 million *annually*. 16 U.S.C. § 460*l*-5.

[32] Despite Petitioners' contrary argument (at 41-42), there is no meaningful "operational difference" between FWS's view of "harm" and its view of the habitat "determined . . . to be critical" that is protected by ESA § 7(a)(2). Pet. App. 92a-93a; *compare* 50 C.F.R. §§ 17.94 and 402.02 (descriptions of critical habitat) *with* the "harm" regulation and the preamble descripiton at 46 Fed. Reg. 54,750 (J.A. 72). FWS has defined the ESA § 7 concept of "destruction or adverse modification" of critical habitat as meaning an action that "diminishes the value of the critical habitat for both the survival and recovery of a listed species." 50 C.F.R. § 402.02. Quite evidently, such a diminution in the survival and recovery rate will occur when individuals die young or have decreased reproductive success. This replicates the "harm" standard of a "habitat modification" which "actually" lessens the "breeding" success of a listed species. *See id.* § 17.3; note 4, *supra*.

Petitioners protest at some length (at 41-44) that ESA §§ 7 and 9 are not rendered coextensive by the "harm" regulation. Their best argument that habitat to be protected under the "harm" regulation differs from critical habitat to be protected under § 7 seems to be that critical habitat can include areas "not curently inhabited by the species," whereas § 9 would not reach those areas. It trivializes the Act to suggest that Congress intended no difference between §§ 7 and 9 except the regulation of currently unoccupied areas.

Thus, under FWS's interpretation of "harm," ESA § 9 would subsume all the significant aspects of § 7 of the 1973 ESA. *See* Pet. App. 93a. If " 'taking' comprehends habitat destruction, then it is at least doubtful whether Section 7 of the Act is even necessary." M. Bean, *The Evolution Of National Wildlife Law* 397 (GPO 1977); *see* Salzman, *Evolution and Application of Critical Habitat under the Endangered Species Act*, 14 Harv. Envtl. L. Rev. 311, 330 (1990) (FWS's interpretation of harm "effectively supplants jeopardy" as the ESA's operative standard).[33]

FWS's interpretation does more than create minor "overlaps" (Pet. Br. at 17, 43) among the ESA's provisions. It either makes whole sections of the ESA entirely superfluous, or relegates them to a minor role in relation to the comprehensive duty to avoid "harm" conceived by FWS. The Court is rightly "hesitant to adopt an interpretation of a congressional enactment" having such effects. *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 837 (1988).

D. Established Precedents and Principles of Construction Suggest Skepticism of FWS's Interpretation

Other well-established principles of construction and precedents of the Court—based in policy, common sense, or the legal background against which Congress is presumed to legislate—are also appropriate guides for interpreting statutes and determining whether deference is ap-

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[33] ESA § 7 cannot be relegated to such a subsidiary role. Even in 1982, the chairman of the House subcommittee with ESA jurisdiction described ESA § 7 as "the 'guts' of the act" and an environmental group spokesman agreed that ESA § 7(a)(2) "is, without question, the most important provision of the Act." *Endangered Species Act: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the Comm. On Merchant Marine and Fisheries*, 97th Cong., 2d Sess. 151 (statement of Rep. Breaux), 164 (statement of Michael J. Bean) (1982) ("1982 House Hearings").

propriate. Even were Petitioners' case stronger than it is on the face of the statute (and the legislative history, *see* subsection E below), the concerns reflected in those principles and precedents would warrant a healthy skepticism about the agency's interpretation of "harm."

First, FWS's interpretation broadly expands the agency's power and the ESA's reach based on the seemingly incidental use of a word in a statutory definition. Caution is warranted where an agency seizes on an elastic word to "bootstrap itself into an area in which it has no jurisdiction." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990). The court of appeals put it this way:

> The extension [claimed by FWS] vests the Department with authority to supervise the use of privately owned land in vast tracts of the United States, even to the point of forbidding modest clearing efforts conducted in the interest of fire protection in populated areas. . . . Congress clearly did not hang so massive an expansion of government power on so slight a nail as § 9's provision that no one should "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" an endangered species.

Pet. App. 96a.

Second, the Court should be wary of Petitioner's claim that Congress converted what are commonly regarded as innocent land uses into violations of law. Many activities are thought of as sufficiently questionable that a person engaging in them would not be surprised to find that he or she is subject to regulation. Taking game (in the ordinary sense) is of that character: it is common knowledge that hunting and fishing require a license. But a different set of activities is at issue here. One does not perceive that the cutting of trees on one's own land, or the tilling of one's field, or the harvesting of one's crops, is an activity subject to government regulation (let alone government prohibitions against taking game). There is nothing in the ESA (or its history) to suggest that Con-

gress intended to upset such settled expectations. This Court requires a clear statutory statement before finding that common activities like these have been transformed into crimes. *E.g., Ratzlaf v. United States,* — U.S. —, 114 S.Ct. 655, 660-62 (1994).

Third, participants in heavily regulated industries (such as banking, insurance, or securities) might fairly anticipate that their actions could easily cross the line from the lawful to the unlawful—and be alert to where such lines are drawn. Moreover, *within* the confines of an elaborate regulatory framework, it is appropriate to defer to agency judgments. But the many forms of activity that are potentially rendered unlawful by Petitioners' construction of "harm" are not "heavily regulated." Nor can the agency's construction fairly be described as internal gap-filling. To the contrary, it is nothing less than a broad extension of the Act's prohibitory scope.

Fourth, the familiar rule of lenity mandates that criminal statutes be narrowly construed. Petitioners argue, of course, that they are entitled to massive doses of *Chevron* deference. But *Chevron* should have no application to a provision, such as this, that effectively criminalizes ordinary activities. *See* Pet. App. 97a; note 2, *supra.* Where a statutory term has both civil and criminal consequences, the rule of lenity requires the courts to "resolve . . . ambiguity in [the defendant's] favor." *United States v. Thompson/Center Arms Co.,* —— U.S. ——, 112 S.Ct. 2102, 2109-10 (1992) (plurality opinion); *see id.* 112 S.Ct. at 2111 (concurring opinion) ("rule of lenity prevents" the government's broad interpretation even in a civil setting); *Crandon v. United States,* 494 U.S. 152, 157-58 (1990) (also applying the rule of lenity in a "civil remedy" context).

In several recent cases, the rule of lenity has prevailed over an agency's contrary view of the statute. *See United States v. Granderson,* —— U.S. ——, 114 S.Ct. 1259, 1267 (1994); *Thompson/Center,* 112 S.Ct. at 2110 and n.9; *Crandon,* 494 U.S. at 177-78 (concurring opinion).

The rule of lenity should prevail because it reflects: (1) the separation of powers concern that Congress (not agencies or courts) should ordinarily define crimes; and (2) the due process concern that statutory terms with criminal consequences should be defined narrowly to provide fair warning of the conduct that will occasion those penalties.[34]

The rule of lenity has particular force in a case like this one, where the agency has gratuitously offered its gloss to an ordinary statutory term. If deference is warranted at all when an agency interprets an everyday term like "harm," it is doubtless much less than is owed to a specialized interpretation clearly committed to the agency's expertise.

E. The Legislative History Confirms That Habitat Modification Actions Are Not Regulated Under ESA § 9

Because the language and the structure of the Act illuminate Congress' intent, there is no need to seek guidance in the legislative history. Nevertheless, that history confirms that Petitioners' interpretation is fundamentally inconsistent with Congress' intent. That confirmation comes from both the legislative process itself and the explanatory statements of the Senate and House leaders who managed their respective bills through that process.

1. Given Congress' conceded understanding that habitat destruction was a major cause of species extinction, the absence of *any* legislative history directly supporting the proposition that "take" encompasses habitat modification weighs heavily against FWS's interpretation.[35] The Court

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[34] *See United States v. Kozminski*, 487 U.S. 931, 952 (1988); *United States v. Bass*, 404 U.S. 336, 347-49 (1971). *See also* Note, *Increased Scrutiny for the Administrative Crime*, 77 Cornell L. Rev. 612, 642-46 (1992).

[35] In this respect, the transcripts of the 1972 and 1973 ESA committee hearings are telling. If the statute had been perceived

ought not interpret "vague" language to "effect a major change" (expansion of "take" into the new arena of land use activities) without "at least some discussion in the legislative history." *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992). The conspicuous silence suggests that "no reasonable legislator" actually perceived the breadth in ESA § 9 that Petitioners claim Congress intended.

2. The 1973 Congress had before it language very similar to that which FWS would now impose on the statute by regulation, but Congress decided *not* to include it in the bill as passed. A reference to "habitat modification" had been included in an earlier version of the ESA definition of "take."[36] Notwithstanding testimony emphasizing that the language was necessary to prevent listed wildlife from being "killed as a result of habitat modification," the Senate Committee on Commerce deleted that reference when it reported the bill to the full Senate.[37] *See* Pet. App. 9a-10a. The "deliberate deletion of habitat modification" from the "take" definition is flatly inconsistent with the notion that Congress

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as reaching ordinary uses of land, witnesses from the forest products, farming, housing, and other affected sectors would have sought to testify and their testimony would have been welcomed by the congressional committees. Moreover, the vote itself belies the agency interpretation. The ESA passed unanimously in the Senate and with only 12 nay votes in the House. The very lack of controversy demonstrates that no one imagined a basis for the broadening gloss FWS has now added.

[36] Specifically, § 3(6) of S. 1983 had defined "take" to include the "destruction, modification, or curtailment of [a listed species'] habitat or range." *Endangered Species Act of 1973: Hearings on S. 1592 and S. 1983 Before the Subcomm. on Environment of the Senate Comm. on Commerce*, 93d Cong., 1st Sess. 27 (1973) ("*1973 Senate Hearings*").

[37] *1973 Senate Hearings* at 80; *see id.* at 81-116. The reported version defined "take" as "harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct," much as the ESA does today. S. Rep. No. 307, 93d Cong., 1st Sess. 14 (1973).

intended "habitat modification" to be a method by which "take" could occur. Pet. App. 9a. "Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *Cardoza-Fonseca*, 480 U.S. at 442-43 (collecting cases).

Petitioners argue (at 28-29) that the Senate Committee Report does not explain *why* "habitat modification" was deleted from the bill as reported.[38] Given Congress' emphasis on habitat protection in other sections of the Act (*see* pages 23-24, *supra*) and the explanation of the Senate floor manager (*see* page 34, *infra*), the only plausible reason is that the Committee did not want habitat modification to be a "take." It is not reasonable to infer that the language was deleted because the Committee somehow believed destruction of habitat was already a "take."[39]

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[38] Petitioners argue (at 28-29) that the language was deleted because it was overbroad, reaching *any* habitat modification "without regard to any effect on wildlife." If that had been the intent of the unenacted language, Congress certainly could have fixed the problem directly. For example, it could have prohibited "habitat modification causing injury." Instead, it deleted *all* references to such activity in ESA § 9.

[39] In fact, several legislators stated that they disapproved of the effort to define "take" to include destruction of habitat. Senator Stevens said, "I understand the comment about habitat. You [the environmental groups] have all commented on that with respect to wildlife. I really question it . . . ." *1973 Senate Hearings* at 90. In the 1973 House Hearings, environmental groups urged that the House bill's definiiton of "take" be expanded to include "habitat modification." *See Endangered Species: Hearings on H.R. 37 and Other Bills Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 93d Cong., 1st Sess. 251, 287, 299, 301, 307 (1973). The House declined to do so. *See id.* at 305. Even if the deletion of "habitat modification" were completely unexplained, the Court should give effect to such a legislative deletion, as it did in *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, —— U.S. ——, 114 S.Ct. 517, 526 (1993).

3. The statements of the Senate and House floor managers confirm that "take" was meant in its ordinary sense and did not address "habitat modification." In explaining the ESA provisions that their colleagues would be voting on, Senator Tunney and Representative Sullivan each described the Act as dealing separately with (1) the problem of predation by man, and (2) the distinct problem of habitat destruction.

Senator Tunney stated:

> Many species have been inadvertently *exterminated by a negligent destruction of their habitat. . . .* Under this bill, we can take steps to make amends for our negligent encroachment. The Secretary would be empowered to use the *land acquisition authority* . . . to acquire land for the use of the endangered species programs. . . . *Through these land acquisition provisions, we will be able to conserve habitats necessary to protect fish and wildlife from further destruction.*
>
> Although most endangered species are threatened primarily by the destruction of their natural habitats, a significant portion of these animals are subject to *predation by man* for commercial, sport, consumption, or other purposes. The provisions of S. 1983 would prohibit the commerce in or the importation, exportation, or *taking* of endangered species except where permitted by the Secretary.

119 Cong. Rec. 25,669 (July 24, 1973) (emphasis added).[40]

Rep. Sullivan, whose Committee on Merchant Marine and Fisheries had declined to add "habitat modification"

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[40] Even after "harm" was added to the bill's definition of "take," Senator Nelson made the same distinction between ESA § 9's assurance that "an animal or fish species will not be overtly 'taken' " and "another danger" separately posed by "habitat modification." 119 Cong. Rec. 25,691 (July 24, 1973); *see also* 119 Cong. Rec. 25,678 (July 24, 1973), 42,451 and 42,535 (Dec. 19, 1973) (remarks of Sens. Moss and Stevens).

to the ESA "take" definition, distinguished between: (1) the "destruction of . .. habitat", which the Act "will meet . . . by providing funds for acquisition of critical habitat", and (2) "[a]nother hazard," involving people who "capture or kill [listed species] for pleasure or profit," which the Act would address through the "take" prohibition:

> For the most part, the principal threat to animals stems from the *destruction of their habitat.* The destruction may be intentional, as would be the case in clearing of fields and forests for development or resource extraction, or it may be unintentional, as in the case of the spread of pesticides beyond their target area. . . . H.R. 37 *will meet this problem by providing funds for acquisition of critical habitat.* . . . It will also enable the Department of Agriculture to cooperate with *willing landowners* who desire to assist in the protection of endangered species, but who are *understandably unwilling to do so at excessive cost to themselves.*
>
> *Another hazard* to endangered species arises from those who would *capture or kill them for pleasure or profit.* There is no way that Congress can make it less pleasurable for a person to *take* an animal, but we can certainly make it less profitable for them to do so.

119 Cong. Rec. 30,162 (Sept. 18, 1973) (emphasis added). Thus, as the Act was described on the floor of the Senate and House, "take" was used in its ordinary sense to refer to predation by man; the preservation of habitat needed for survival of a species was addressed by other provisions.[41]

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[41] A contemporaneous law review article examined the legislative history and foreshadowed by 20 years the common sense conclusion of the court below:

> Congress meant to apply taking restrictions to stop killing or otherwise harming the animal directly but reserved the acquisition power. . . as the sole remedy for protecting habi-

4. "Harm" was added to the ESA's "take" definition as one of 24 "technical" and "clarifying" amendments considered and adopted "en bloc,' without debate, on the Senate floor.[42] It would require a remarkably jaundiced view of the legislative process to believe that the most expansive and intrusive aspect of the ESA became law through stealth, rather than debate, slipped into the law by misdescribing the operative language as merely clarifying and technical. *See Granderson,* 114 S.Ct. at 1266-67 (narrowly construing an undebated floor amendment). It is far more realistic to read "harm" as the minor technical addition that it was described to be, rather than as a fountainhead for the regulation of ordinary land use activities under the ESA.

5. Petitioners read too much into two statements in Committee Reports:

> "Take" is defined in section 3(12) in the broadest possible manner to include every conceivable way in which a person can "take" or attempt to "take" any fish or wildlife.

S. Rep. No. 307, *supra* at 7, *reprinted in* 1973 U.S.C.C.A.N. 2995.

> "Take" is defined broadly. It includes harassment, whether intentional or not. This would allow, for

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tats. . . . Based on this legislative history it is clear that "taking" should not apply to commercial cutting of timber on private lands.

Lachenmeier, *The Endangered Species Act of 1973: Preservation Or Pandemonium?*, 5 Envtl. L. 29, 39-41 (1974). *See also* Gidari, 24 Envtl. L. at 459 ("Congress cannot be said to have intended to circumscribe the development of private lands through the prohibitions of section 9 of the ESA").

[42] 119 Cong. Rec. 25,682-83 (July 24, 1973). Petitioners highlight (at 29) that Senator Tunney described the 24 amendments as including language "omitted from early drafts which went unnoticed" and which "will help to achieve the purposes of the bill." But there is no indication this portion of his explanation referred to "harm," or that anyone would have understood it in that way.

> example, the Secretary to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young.

H.R. Rep. No. 412, 93d Cong., 1st Sess. 11 (1973).

These are essentially circular statements that "take means take." *See* Pet. App. 71a. The focus on "take" is not helpful to Petitioners, because a "take" of wildlife is an action directed at wildlife. *See* pages 13-22, *supra*. Moerover, even a *statutory* clause (as opposed to this legislative history) directing that an Act be construed broadly "is not an invitation to apply [the Act] to new purposes that Congress never intended. Nor does the clause help us to determine what Congress had in mind." *Reves v. Ernst & Young*, —— U.S. ——, 113 S.Ct. 1163, 1172 (1993). Finally, "harm" was not in the ESA bills reported by these Committees (having been added later, on the Senate floor), and was therefore not the subject of these Committee Reports.

The birdwatching example, of course, fits squarely within the model that "take" focuses on action directed at, and directly intruding upon, specific wildlife. *See* pages 16-17, *supra; Gidari*, 24 Envtl. L. at 459 ("it is clear from the birdwatching example that the harassment had to be directed against an individual member of the species and that the effects of the conduct had to be palpable"). The legislative history thus confirms what the text of ESA § 9 and the structure of the Act show—that Congress intended the "take" prohibition to halt all forms of predation against listed species, but never meant that prohibition to address the "separate" problem of habitat modification.

II. PETITIONERS' REMAINING ARGUMENTS DO NOT OVERCOME THE TEXT AND STRUCTURE OF THE ACT

A. The "Facial Challenge" Argument Is A Red Herring

For the first time, Petitioners present an argument that this is a "facial challenge" to the "harm" regulation. They assert that Sweet Home failed to meet its alleged burden (under *Reno v. Flores*, —— U.S. ——, 113 S.Ct. 1439, 1446 (1993)) of showing the absence of any circumstances under which the regulation would be valid.[43] The argument is a red herring.

1. In *Reno*, the Court was asked to address the validity of a regulation that had never "been applied in a particular instance." 113 S.Ct. at 1446. The challenge was based on the theory—unsupported by evidence or actual illustration—that the regulation *might* be applied in ways that would raise constitutional problems. *See, e.g., id.* at 1451 (absence of specific time period for hearing does not invalidate regulation because court cannot simply "assume, on . . . facial challenge, that an excessive delay will invariably ensue"). The Court had before it "no findings of fact, indeed no record, concerning the [agency's] interpretation of the regulation or the history of its enforcement." *Id.* at 1446. In those circumstances, the Court was unwilling to declare the regulation invalid on its face, based on the mere possibility

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[43] Petitioners did not present the "facial challenge" theory to the district court, the original panel, or the rehearing or *en banc* panels, apparently accepting that this was at bottom a concrete, "as applied" challenge, albeit broad enough to undermine the entirety of the regulation. The Court should not consider an argument that was not presented to (or addressed by) the panel below. *See Taylor v. Freeland & Kronz*, —— U.S. ——, 112 S.Ct. 1644, 1649 (1992) (in order to "maintain the integrity of the process of certiorari", the Court does not ordinarily decide questions not raised in the lower courts).

that the regulation might, in some *future* circumstances, be improperly applied.

In contrast, where the challenge concerns a central feature of a regulation, the Court has found (and indeed the APA itself provides) that regulations may be reviewed to determine whether they exceed statutory authority.[44] *E.g., Board of Governors of Fed. Reserve Sys. v. Dimension Financial Corp.*, 474 U.S. 361 (1986) (invalidating regulation as inconsistent with statutory authority even though the regulation encompassed not only its invalid application to "nonbank banks" but its valid application to true "banks").

This case bears no resemblance to the situation in *Reno*. This challenge does not depend on hypothetical, extreme, or potential aberrant applications of the "harm" regulation. To the contrary, it addresses directly the central features of the regulation and the "habitat modification" example around which it was written.[45]

The regulation has been applied to Respondents (through the owl guidelines and otherwise) in ways that

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[44] In the APA, Congress directed that a "reviewing court shall . . . hold unlawful and set aside agency action . . . found to be . . . (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706. Congress has thus provided for "facial" challenges to regulations in excess of statutory authority. In fact, in some cases it has effectively *mandated* them by providing that regulations can only be challenged within 60 days (or some other short time period) of their promulgation. *See, e.g.*, 30 U.S.C. § 1276(a)(1). This challenge was brought pursuant to the APA and the ESA § 11(g) provision on citizen suits. *See* Complaint ¶ 2 (J.A. 17).

[45] This is not a case where the regulation has yet to be applied. There is no dispute about its manner of application and scope. The essential premises of the "harm" regulation (with its focus exclusively on effect, and its express inclusion of habitat modification) go beyond the agency's statutory authority. Those essential premises, evident on the face of the regulation, have limited the ability of Respondents to use their lands; they must conform their conduct to the regulation.

have directly constrained Respondents' ability to harvest timber and engage in related activities; those applications prompted this challenge.[46] The clearly expressed threats of enforcement and the possibility of criminal penalties create a "commanding pressure to comply." Pet. App. 93a. For that reason, no question has been raised about Respondents' standing or the existence of a ripe controversy. For the same reason, Petitioners' newly found "facial challenge" argument is without merit.

In short, this is not a "facial challenge" in the sense of the unapplied and unknown regulation that was before the Court in *Reno*. The concrete application of *this* regulation to Respondents, and the history of its use, leave no room for argument that the regulations will be interpreted within the confines of the Act.

2. Even if this were to be considered a "facial challenge" in some sense, Respondents have squarely met the standard for demonstrating that the regulation is invalid.[47] The regulation was beyond the power of the

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[46] *See* Complaint ¶¶ 4-14, 23-26 (J.A. 17-26); Pet. Br. at 11 (Respondents "are engaged in, or depend upon, timber harvesting" and "allege that they are affected by the 'harm' regulation because of its application to the northern spotted owl" and red-cockaded woodpecker); Pet. App. 76a (similar description by district court). FWS's "owl guidelines" effectively prohibit timber harvesting on up to 3,960 acres surrounding each spotted owl nest site. That restriction applies despite the absence of any evidence or allegation of injury to, or any intention to injure, a single spotted owl. *See* pages 4, 8-9, *supra*.

[47] Petitioners battle strawmen (at length) in suggesting that the court of appeals based its holding on "an extravagant reading and speculative applications." Pet. Br. at 49. Petitioners mischaracterize the narrow purposes for which the court cited its examples. Moreover, the aspects of the regulation cited by Petitioners as providing a narrower view of its scope address the quantum of injury that must be shown. *E.g.*, Pet. Br. at 46-49. The primary flaws in the agency definition do not involve that

agency to adopt because it prohibits conduct that, *under the statute,* is lawful. It does so by excluding from the definition the central characteristics needed to render such conduct *un*lawful under the Act. What this means, of course, is that the "harm" regulation is overbroad in *every* application. The elimination of the essential attributes of the type of conduct meant to be prohibited by ESA § 9—actions *directed at* wildlife, directly injuring wildlife—is what makes the agency's regulation *ultra vires. See* Pet. App. 95a. The model it establishes for *proper* enforcement (habitat modification, in the form of withdrawing some benefit from a species) is a paradigm of the type of action that cannot be a wildlife "take."[48] Such a regulation, being "in excess of statutory jurisdiction," should be held "unlawful and set aside." 5 U.S.C. § 706.

B. The 1978 and 1982 ESA Amendments Did Not Change The Meaning Of "Take" Or Ratify The 1981 "Harm" Regulation

Petitioners rely heavily on the legislative history of the ESA Amendments of 1978 ("1978 Amendments") and 1982 ("1982 Amendments"). *See* Pet. Br. at 31-40. The court below examined Petitioners' arguments at length, and found them insufficient to sustain the regulation. *See* Pet. App. 10a-24a. Judge Mikva, dissenting,

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issue; they concern the regulation's indifference to the nature of the conduct sought to be prohibited.

[48] It is unavailing to suggest (*e.g.*, Pet. at 25-26) that "habitat modification" might be *purposely* used to kill listed wildlife (as in the example posed by Judge Silberman, in which the lake is drained in order to kill the fish). Such an action can certainly be prohibited or punished under the Act as it is written, because the example *assumes* that the action was directed at wildlife. But under the "harm" regulation, a court or agency applying the statute would never reach the question whether the action was directed at wildlife. It would be sufficient that the action *affected* the subject wildlife to the requisite degree.

acknowledged that the subsequent legislative history, standing alone, does not support the weight of the agency's interpretation. Pet. App. 39a.

This Court has repeatedly cautioned that "the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, —— U.S. ——, 114 S.Ct. 1439, 1452 (1994), *quoting Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 168 (1989). The Court's reluctance is grounded in constitutional principle: "Congress may legislate . . . only through passage of a bill which is approved by both Houses and signed by the President. *See* U.S. Const. art. I, § 7, cl. 2." *Central Bank*, 114 S.Ct. at 1453. The Court must be guided by the intentions of the Congress that actually passed the law. Later legislative-history "statements do not have 'the force of law, for the Constitution is quite explicit about the procedure that Congress must follow in legislating.' " *NLRB v. Health Care*, 114 S.Ct. at 1784-85, *quoting American Hospital Ass'n v. NLRB*, 499 U.S. 606, 616 (1991).

Even the reenactment of a statute is not enough to ratify a regulation, absent some specific endorsement of that regulation. Where "the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction." *Brown*, 115 S.Ct. at 556-57, *quoting Demarest*, 498 U.S. at 190. In any event, neither the 1978 Amendments nor the 1982 Amendments reenacted the ESA § 3(19) definition of "take" or the § 9 language on "take." They were both directed to the revision of selected other sections. *See* 92 Stat. 3751 (1978); 96 Stat. 1411 (1982). Consequently, the sometimes stated principle that Congress ratifies a regulation when it reenacts a statute and voices its approval of the regulation does not apply. *See NLRB v. Health Care*, 114 S.Ct. at 1784; *Central Bank*, 114 S.Ct. at 1452

(because "Congress has not reenacted the language of § 10(b) . . ., we need not determine whether the other conditions for applying the reenactment doctrine are present"); *Betts*, 492 U.S. at 162; Pet. App. 23a-24a.

1. Petitioners argue (at 31-32) that the legislative history of the 1978 Amendments supports the validity of the "harm" regulation because Senator Garn proposed in that year, and later withdrew, an amendment that would have negated the "harm" regulation. In fact, Senator Garn proposed (and ultimately withdrew) a wholesale revision of the ESA, of which the provision cited by Petitioners was only one small part. *See* 124 Cong. Rec. 21,565 (July 19, 1978); Pet. App. 15a-16a. There was no debate on the withdrawn amendment, and there is no indication in the legislative history of any particularized concern about the proposed revision of ESA § 9 that it contained. Pet. App. 15a-16a. There can be many reasons for congressional action or inaction. *See* Pet. App. 21a. As the Court reiterated only recently, "congressional silence 'lacks persuasive significance.'" *Brown*, 115 S.Ct. at 557, *quoting Central Bank*, 114 S.Ct. at 1453.

2. Petitioners (at 34-40) focus most heavily on the 1982 Amendments. Those Amendments modified ESA § 10(a) to provide a process for authorizing a "taking [which] is incidental to, and not the purpose of, carrying out an otherwise lawful activity."[49] There is certainly nothing in the text of the 1982 Amendments that endorses or adopts the agency's view of "harm." The relief granted by the Amendments is consistent with either a broad or a more narrow view of "harm."

The 1982 Amendments provide a means by which prohibited activities that incidentally take protected wildlife

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[49] 16 U.S.C. § 1539(a)(1)(B). The prerequisites for obtaining such an "incidental take permit" include: (1) preparing and agreeing to be bound by a "conservation plan", and (2) agreeing "to the maximum extent practicable, [to] minimize and mitigate the impacts of such taking." *See id.* § 1539(a)(2).

might nonetheless be permitted. Absent such a provision, a trapper who set traps to catch an unprotected species would be in violation of the law if a listed animal instead chanced within the snare. *See* Pet. App. 11a. The "incidental take permit" amendment gives the trapper a way out. It allows the activity to go forward, without the trapper having to fear prosecution, if the take of the *protected* species is truly incidental, will not severely harm the population, and if efforts are made to mitigate the effects of the action on protected species.

a. This understanding of "incidental take" as an action directed at wildlife, which inadvertently "takes" listed wildlife, follows from the only examples of "incidental take" that Congress enacted into law. The first statutory example concerns the "incidental taking of . . . sea turtles" while harvesting "shrimp." 103 Stat. 1038 (1989), 16 U.S.C. § 1537 note (Supp. II 1990), at § 609(b)(2). In the second example, embodied in the 1994 MMPA amendments, Congress adopted provisions to "govern the incidental taking of marine mammals *in the course of commercial fishing operations*. . . ." 108 Stat. 546, § 118(a) (1994) (emphasis added); *see also Pacific Northwest Generating Cooperative v. Brown*, 38 F.3d 1058, 1067-68 (9th Cir. 1994) (approving " 'incidental' take" of listed salmon under the ESA while fishing for other salmon). It does no violence to the meaning of "take" to suggest that when one is out setting nets to "take" shrimp, and unintentionally captures or kills a listed sea turtle instead, one has "taken" the turtle along with the shrimp. Indeed, that would be an ordinary use of the word "take."

b. There appears to be no contrary example in which Congress has adopted statutory provisions that equate "incidental take" with "habitat modification" activities. Petitioners focus instead (at 35-36) on an ambiguous excerpt from the legislative history of the 1982 Amendments, a discussion of the plan adopted to protect two listed butterflies. Nothing in that legislative history,

however, demonstrates that Congress understood "habitat modification" to be the source of the asserted "take." Indeed, the legislative history appears to suggest other sources. *See* H.R. Conf. Rep. No. 835, 97th Cong., 2d Sess. 32 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2873; 128 Cong. Rec. 26,188 (Sept. 30, 1982) (remarks of Rep. Breaux).[50]

What *is* clear, however, is that the Conference Report's discussion is centered on the types of remedial conservation activities that FWS might find acceptable in exercising its enlarged permitting power. While the Report does indicate that a "habitat conservation plan" could be the *remedy* for a "take," this "does not imply . . . that *takings* encompass habitat modification." Pet. App. 14a.

c. It is true that during the 1982 House Hearings, a House Subcommittee received some conflicting testimony about whether the ESA contemplated that "take" would reach activities not directed at harming wildlife.[51] *See* Pet. Br. at 37. Additionally, a passage in the 1982 Senate Report compares plant protection with animal protection in a way that acknowledges the FWS view that "harm" includes habitat modifications. *See id.*

These snippets of legislative history at most demonstrate that some committee staffers (those who wrote the "plant" section of the Senate Report), and presumably some members of the respective Committees, were aware that FWS had adopted the "harm" regulation. But this resolves nothing, because Congress, as a legislative body,

[50] Another legislative history example, addressed by the court of appeals, belies Petitioners' theory. *See* Pet. App. 11a-13a.

[51] *Compare 1982 House Hearings* at 233-34, 240, 342 *with id.* at 273, 290-94, 343, 425-28. Many witnesses recommended that the debate about the meaning of "harm" be resolved by adopting remedial provisions allowing incidental take, and FWS agreed. *See id.* at 327-333, 355, 357, 484, 622-27, 648. The "incidental take" provisions subsequently adopted were thus *remedial provisions successfully obtained* to provide relief from ESA § 9 *whatever its scope*. As such, they cannot be deemed an endorsement of the "harm" regulation.

did not actually build such an interpretation into the Amendments.[52] This is not a case where "one or the other interpretation . . . is essential" to the amendatory legislation. *MCI Telecommunications Corp. v. AT&T*, —— U.S. ——, 114 S.Ct. 2223, 2233 (1994).

d. Even if FWS's broad interpretation of "harm" had been widely understood,[53] and some members, or perhaps a majority, of Congress had focused on mitigating the effects of that interpretation, the granting of relief by Congress in the 1982 Amendments could not be taken as a ratification or endorsement of the agency's prior *ultra vires* interpretation. The 1982 Congress (or some or all of its voting members) could have "supported the [Amendments'] permit system on a completely agnostic premise about [the interpretation of "harm"]: 'There are some pretty wild interpretations out there, and they may stick; if they do, it would certainly be helpful to have a mechanism for softening their impact.' " Pet. App. 12a-13a.

Since the 1973 ESA did *not* include ordinary land uses within "take," the possibility that some members of the 1982 Congress acted on the opposite assumption in adopting the "incidental take" provisions would change nothing. *See Landgraf*, 114 S.Ct. at 1495; *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 (1991); Pet. App. 17a ("where Congress adopts amendments on the basis of misconception as to the meaning of a prior statute's related provisions, the later act does not turn the

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[52] The legislative history, of course, is not law. *E.g., NLRB v. Health Care*, 114 S.Ct. at 1784-85; *Landgraf v. USI Film Products*, —— U.S. ——, 114 S.Ct. 1483, 1495-96 (1994); *Central Bank*, 114 S.Ct. at 1453.

[53] Given the shifting and elusive interpretations of "harm" by the agency itself (*see* Brief of *Amicus Curiae* Cargill, Inc.), it is not possible to say that Congress endorsed any particular agency theory. *See also* Brief of *Amicus Curiae* National Wildlife Federation, *et al.*, at 7 (the "harm" regulation was little understood because there had been no federal "actions to enforce the 'harm' regulation" in 1975-81).

misconception into law"). At bottom, the "opinion of this later Congress as to the meaning of a law enacted 10 years earlier does not control the issue"; rather, it "is the intent of Congress that originally enacted the provision" that controls. *Mackey*, 486 U.S. at 839-40.

3. There is other *statutory* language enacted in the 1978 and 1982 Amendments that further undercuts Petitioners' argument that the "harm" regulation was implicitly ratified by those Amendments. In 1978 and 1982, Congress adopted and reenacted important ESA provisions regarding critical habitat.

Congress specifically defined critical habitat and required FWS to designate such habitat for each listed species, generally when the listing decision is made.[54] Importantly, it required FWS to make the designations of critical habitat by regulation, utilizing the APA's notice and comment rulemaking procedures. 16 U.S.C. § 1533 (a)(3), (b)(4). Congress specifically directed FWS to take into "consideration the economic impact . . . of specifying any particular area as critical habitat," and allowed FWS to "exclude any area from critical habitat" if "the benefits of such exclusion outweigh the benefits" of inclusion. *Id.* § 1533(b)(2). The unmistakable import is that Congress did not intend habitat protection—even *critical* habitat protection—to be universally and unilaterally imposed by FWS, without regard to other considerations.[55] These provisions cannot be squared with

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[54] 16 U.S.C. §§ 1532(5)(A), 1533(a)(3). "Critical habitat" was defined to mean the "specific areas . . . which may require special management considerations or protection." *Id.* § 1532(5)(A). This suggests that habitat outside critical habitat boundaries does not warrant "special protection" under the ESA.

[55] *See* 124 Cong. Rec. 38,156 (Oct. 14, 1978) (remarks of Rep. Buchanan); 124 Cong. Rec. 38,666 (Oct. 14, 1978) (remarks of Rep. Murphy that the provision authorizing FWS "to alter the critical habitat designation based on this economic evaluation" is "the most significant provision in the entire bill"); S. Rep. No. 418, 97th Cong., 2d Sess. 11-12 (1982).

the "harm" regulation, making it apparent that the 1978 and 1982 Amendments did not ratify that regulation.[56]

C. *TVA v. Hill* Did Not Decide the Meaning of "Take" or Endorse the Agency's View

Petitioners rely throughout on *TVA v. Hill*, 437 U.S. 153 (1978). Although they invoke (at 6, 30) the Court's characterization of the "harm" regulation, *see* 437 U.S. at 184-85 n.30, the *TVA* Court merely assumed the validity of that regulation. Unlike this case, no party in *TVA* had "suggest[ed] that the Secretary exceeded his authority or abused his discretion in issuing the regulations." [57]

Petitioners (at 17, 30) also highlight the *TVA* statement that the ESA was intended to "reverse the trend

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[56] The "harm" regulation undermines the effectiveness of these provisions. There is little incentive for FWS to designate *critical* habitat by rulemaking if it can effectively protect *all* habitat against modification by simply applying its inflated version of ESA § 9. As a result, the ESA § 7(a)(2) duty of federal agencies to protect critical habitat loses its force, and is effectively shifted to the private sector. *See* Pet. App. 7a. Moreover, two important benefits that Congress provided private landowners are lost: (1) the right to participate (through the rulemaking process) in the designation of protected habitat, and (2) the right to have the economic impact of the designation considered.

[57] 437 U.S. at 172. No ESA § 9 "take" issue was before the Court. The lower courts had found violations of ESA § 7. *See Hill v. TVA*, 419 F. Supp. 753, 755 and n.1 (E.D. Tenn. 1976), *aff'd in pert. part*, 549 F.2d 1064, 1069-70 and notes 13 and 14 (6th Cir. 1977), *aff'd*, 437 U.S. 153 (1978). This Court observed that it was not reviewing the existence of those violations, but only whether injunctive relief should issue and whether an implied repeal had occurred. *See* 437 U.S. at 156, 171-72; *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 543 n.9 (1987) (ESA § 7 violations were "conceded" in *TVA v. Hill*). *TVA* is not dispositive as to the "harm" regulation, because it is "contrary to all traditions of our jurisprudence to consider the law on [a] point conclusively resolved by broad language in cases where the issue [here, the legality of the "harm" regulation] was not presented." *R.A.V. v. City of St. Paul*, —— U.S. ——, 112 S.Ct. 2538, 2545 n.5 (1992).

towards species extinction, whatever the cost." 437 U.S. at 184. But that statement does not mean that courts must adopt all interpretations that favor listed species.[58] It "frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987).

The court below, as it should have, looked to see how *Congress* chose to "reverse the trend towards species extinction." It determined that Congress addressed the problem of habitat destruction by imposing duties on the federal government, and addressed the separate problem of predation by making it unlawful for anyone to "take" listed species. Under that scheme, it held the "harm" regulation invalid.

D. Petitioners' Policy Arguments Are Unavailing

Petitioners emphasize Congress' recognition that habitat modification has significant effects on species. They argue, in essence, that the purpose of the Act would be better served if ESA § 9 were construed to reach habitat modification. Such appeals to "policy" are unavailing to override "the text and structure of the Act." *Central Bank*, 114 S.Ct. at 1448, 1453-54.

In any event, the ESA's habitat protection purpose is in fact carefully addressed in the Act. ESA §§ 2(c), 4, 5 and 7 further the habitat conservation purpose through a combination of different federal mechanisms: (1) the

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[58] *See National Wildlife Fed'n v. Burlington Northern R.R.*, 23 F.3d 1508, 1512 (9th Cir. 1994); *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 34, *reh'g denied*, 972 F.2d 1362 (D.C. Cir. 1992). Even federal agencies do not have an absolute duty to avoid jeopardizing the continued existence of listed species. *See* 16 U.S.C. § 1536(e)-(j). And the extent of designated critical habitat can be reduced based on "economic" considerations "and other relevant factors." *Id.* § 1533(b)(2).

federal duty to conserve by designating critical habitat under ESA § 4; (2) the federal duty under ESA § 7 to conserve and to insure that federally-authorized actions will not adversely modify critical habitat; and (3) the federal duty under ESA § 5 to conserve needed habitat on non-federal lands by acquiring land interests.[59]

Finally, Petitioners (at 21) ask rhetorically why a Congress which recognized that habitat modification was the greatest threat to species would impose habitat protection obligations on federal agencies, but draw the line at imposing habitat preservation duties on private citizens.[60] The question nearly answers itself. As House floor manager Sullivan made clear, Congress wished to protect private property rights and to avoid federal interference with private land uses. *See* pages 24, 33, *supra*.

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[59] *See* pages 22-24, *supra*. These mechanisms, properly exercised, can be very effective. Nearly one-third of the Nation's land is owned by the federal government. Habitat designated as critical on non-federal lands is protected under ESA § 7(a)(2) to the extent that non-federal actions require federal permits or funding. This extension of the federal power is sufficient to reach the many major private land projects that require some form of federal authorization. Finally, ESA § 5 provides a sure mechanism for protecting habitat—if the federal government makes the policy decision to appropriate the funds necessary to implement it. *See* note 31, *supra*.

[60] Petitioners criticize (at 49-50) the decision below because it eliminates incentives to prepare conservation plans and receive incidental take permits. Private landowners should not, however, be forced to buy their way out of "take" liability that does not exist. Moreover, the high cost and long delays that characterize the permit process make that process impractical for most private landowners. *See* Thornton, *The Search for a Conservation Planning Paradigm: Section 10 of the ESA*, 8 Nat. Resources & Env't 21, 22-23 (Summer 1993); Ruhl, 44 Sw. L.J. 15 1408-23. As a result, only 30 permits have been approved in the past 10 years. Pet. Br. at 50. For a readable case study of the problems associated with fashioning a conservation plan under ESA § 10, *see* C. Mann and M. Plummer, *Noah's Choice—The Future of Endangered Species* 176-211, 216-28 (Knopf 1995).

Although the broad prohibition Petitioners advocate would arguably help preserve endangered species, "[s]tatutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal." *Landgraf*, 114 S.Ct. at 1508.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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Dated: March 24, 1995

APPENDIX

We set forth below the relevant portions of the Endangered Species Act of 1973, as amended and codified at 16 U.S.C. 1531-44 (1988), which were not included in the Appendix to the Brief for Petitioners:

§ 1532. Definitions

For the purpose of this chapter—

* * * * *

(3) The terms "conserve", "conserving", and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

* * * * *

(5)(A) The term "critical habitat" for a threatened or endangered species means—

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is

listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

* * * * *

(13) The term "person" means an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Feedral Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.

* * * * *

(19) The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

* * * * *

§ 1534. Land acquisition

(a) Implementation of conservation program; authorization of Secretary and Secretary of Agriculture

The Secretary, and the Secretary of Agriculture with respect to the National Forest System, shall establish and implement a program to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species pursuant to section 1533 of this title. To carry out such a program, the appropriate Secretary—

(1) shall utilize the land acquisition and other authority under the Fish and Wildlife Act of 1956,

as amended [16 U.S.C. 742a et seq.], the Fish and Wildlife Coordination Act, as amended [16 U.S.C. 661 et seq.], and the Migratory Bird Conservation Act [16 U.S.C. 715 et seq.], as appropriate; and

(2) is authorized to acquire by purchase, donation, or otherwise, lands, waters, or interest therein, and such authority shall be in addition to any other land acquisition authority vested in him.

(b) Availability of funds for acquisition of lands, waters, etc.

Funds made available pursuant to the Land and Water Conservation Fund Act of 1965, as amended [16 U.S.C. 4601-4 et seq.], may be used for the purpose of acquiring lands, waters, or interests therein under subsection (a) of this section.

* * * * *

§ 1540. Penalties and enforcement

(a) Civil penalties

(1) Any person who knowingly violates, and any person engaged in business as an importer or exporter of fish, wildlife, or plants who violates, any provision of this chapter, or any provision of any permit or certificate issued hereunder, or of any regulation issued in order to implement subsection (a)(1)(A), (B), (C), (D), (E), or (F), (a)(2)(A), (B), (C), or (D), (c), (d) (other than regulation relating to recordkeeping or filing of reports), (f) or (g) of section 1538 of this title, may be assessed a civil penalty by the Secretary of not more than $25,000 for each violation. Any person who knowingly violates, and any person engaged in business as an importer or exporter of fish, wildlife, or plants who violates, any provision of any other regulation issued under this chapter may be assessed a civil penalty by the Secretary of not more than $12,000 for each such violation. Any person who otherwise violates any provision of this chap-

ter, or any regulation, permit, or certificate issued hereunder, may be assessed a civil penalty by the Secretary of not more than $500 for each such violation. No penalty may be assessed under this subsection unless such person is given notice and opportunity for a hearing with respect to such violation. Each violation shall be a separate offense. Any such civil penalty may be remitted or mitigated by the Secretary. Upon any failure to pay a penalty assessed under this subsection, the Secretary may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found, resides, or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action. The court shall hear such action on the record made before the Secretary and shall sustain his action if it is supported by substantial evidence on the record considered as a whole.

(2) Hearings held during proceedings for the assessment of civil penalties authorized by paragraph (1) of this subsection shall be conducted in accordance with section 554 of title 5. The Secretary may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and administer oaths. Witnesses summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person pursuant to this paragraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Secretary or to appear and produce documents before the Secretary, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(3) Notwithstanding any other provision of this chapter, no civil penalty shall be imposed if it can be shown by a preponderance of the evidence that the defendant committed an act based on a good faith belief that he was acting to protect himself or herself, a member of his or her family, or any other individual from bodily harm, from any endangered or threatened species.

(b) Criminal violations

(1) Any person who knowingly violates any provision of this chapter, of any permit or certificate issued hereunder, or of any regulation issued in order to implement subsection (a)(1)(A), (B), (C), (D), (E), or (F), (a)(2)(A), (B), (C), or (D), (c), (d) (other than a regulation relating to recordkeeping, or filing of reports), (f), or (g) of section 1538 of this title shall, upon conviction, be fined not more than $50,000 or imprisoned for not more than one year, or both. Any person who knowingly violates any provision of any other regulation issued under this chapter shall, upon conviction, be fined not more than $25,000 or imprisoned for more than six months, or both.

* * * * *

(g) Citizen suits

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or

(B) to compel the Secretary to apply, pursuant to section 1535(g)(2)(B)(ii) of this title, the pro-

hibitions set forth in or authorized pursuant to section 1533(d) or 1538(a)(1)(B) of this title with respect to the taking of any resident endangered species or threatened species within any State; or

(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be. In any civil suit commenced under subparagraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.

(2)(A) No action may be commenced under subparagraph (1)(A) of this section—

(i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation;

(ii) if the Secretary has commenced action to impose a penalty pursuant to subsection (a) of this section; or

(iii) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of any such provision or regulation.

(B) No action may be commenced under subparagraph (1)(B) of this section—

(i) prior to sixty days after written notice has been given to the Secretary setting forth the reasons why an emergency is thought to exist with respect

to an endangered species or a threatened species in the State concerned; or

(ii) if the Secretary has commenced and is diligently prosecuting action under section 1535(g)(2)(B)(ii) of this title to determine whether any such emergency exists.

(C) No action may be commenced under subparagraph (1)(C) of this section prior to sixty days after written notice has been given to the Secretary; except that such action may be brought immediately after such notification in the case of an action under this section respecting an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants.

(3)(A) Any suit under this subsection may be brought in the judicial district in which the violation occurs.

(B) In any such suit under this subsection in which the United States is not a party, the Attorney General, at the request of the Secretary, may intervene on behalf of the United States as a matter of right.

(4) The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

(5) The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Secretary or a State agency).

* * * * *

Supreme Court, U.S.
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No. 94-859

In the Supreme Court of the United States

OCTOBER TERM, 1994

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-859

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

A. Respondents concede (Br. 9) that "harm" is "a word of extraordinary elasticity, arguably capable of the meaning" given to it by the Fish and Wildlife Service (FWS) in its regulation interpreting the prohibition in the Endangered Species Act (ESA) against the "take" of protected species. See 16 U.S.C. 1538(a)(1)(B); 50 C.F.R. 17.3. Respondents contend, however, that each of the other verbs accompanying "harm" in the ESA's definition of "take" (see 16 U.S.C. 1532(19)) describes "purposeful" conduct "directed at some living thing," and they argue that "harm" should be given the same narrow construction. Resp. Br. 7, 10, 13, 14, 16-17, 20.

Respondents' premise is flawed. The ESA does not limit the other verbs in the definition of "take" ("harass, * * * pursue, hunt, shoot, wound, kill, trap, capture, or collect") to "purposeful" conduct specifically "directed at a living

thing." The ESA makes it unlawful to take a protected species, through, for example, wounding or killing, regardless of whether that was the purpose of the act or whether the act was directed at a living thing. Such violations are subject to an injunctive action under 16 U.S.C. 1540(e)(6) and (g)(1)(A), and to a civil penalty of not more than $500 under 16 U.S.C. 1540(a)(1).[1]

Civil penalties of more than $500 and misdemeanor criminal sanctions are available only if the person acts "knowingly," 16 U.S.C. 1540(a)(1) and (b)(1)—*i.e.*, knows, for example, that his action harasses, harms or wounds the type of species affected. Even in such cases, however, it is not necessary to show that the person acted with the *purpose* of harming wildlife. Indeed, the person need not know that the species is endangered or threatened; only a general intent to perform the act, and not a specific intent to violate the ESA, is required.[2]

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[1] As originally enacted, the maximum civil penalty for a non-knowing violation was $1000. 16 U.S.C. 1540(a)(1) (1976). In 1978, Congress "reduce[d] the strict liability penalty for othe[r] than importers and exporters to $500." H.R. Rep. No. 1625, 95th Cong., 2d Sess. 26 (1978); H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 25-26 (1978); see Endangered Species Act Amendments of 1978 (ESAA), Pub. L. No. 95-632, § 6(1) and (2), 92 Stat. 3761. The Conference Committee noted (at 26) that although a tourist who unknowingly violates the prohibition of importing a protected species could be fined up to $500, it "assume[d] that in most cases, law enforcement officials will seek the forfeiture of the item rather than impose a civil penalty."

[2] Respondents acknowledge that 16 U.S.C. 1540(b)(1) "requires only a general intent to perform an act, not a specific intent to violate the ESA." Resp. Br. 2 n.2 (citing *United States* v. *Nguyen*, 916 F.2d 1016 (5th Cir. 1990)). In the 1978 amendments, Congress replaced "willfully" with "knowingly" (see ESAA § 6(3), 92 Stat. 3761) to make "criminal violations of the act a general rather than a specific intent crime." H.R. Conf. Rep. No. 1804, *supra*, at 26.

Respondents err in relying on *United States* v. *FMC Corp.*, 572 F.2d 902 (2d Cir. 1978), to support their argument that all the terms in the definition of "take," including "kill," connote "intentional and directed" conduct. Resp. Br. 13 n.15. The *FMC* court affirmed a conviction for killing protected birds in violation of the narrower "take" prohibition in the Migratory Bird Treaty Act (MBTA), 16 U.S.C. 703 (1988 & Supp. V 1993), based on the death of birds that were attracted to a pond containing chemicals released during the company's manufacturing process. See Gov't Br. 25 & n.12. The company did not intend to attract the birds to its pond, and its actions were in no way directed at the birds. 572 F.2d at 906-908.[3]

Because the ESA imposes a scienter requirement ("knowingly") only for certain civil penalties and misdemeanor sanctions—but not, for example, in civil injunctive actions—respondents err in relying (Br. 10 & n.10) on several dated dictionaries for the proposition that "harm" must be limited in *all* circumstances to *purposeful* efforts to injure. Respondents are even further afield in relying (Br. 19 n.24) on dictionary definitions of "take" that refer to the holding, seizure or possession of an object. Congress provided its own definition of "take" in the ESA that includes harass, harm, pursue and wound, none of which is limited to actual holding, seizure or possession.

[3] Respondents' attempt (Br. 21 n.26) to distinguish *FMC* on the ground that "[t]he manufacture and use of pesticides * * * are actions directed at killing animals" is completely without merit. There is no suggestion in *FMC* that the result would have been different if the chemical being manufactured was not a pesticide.

Respondents quote a passing comment in *FMC* that it "'would offend reason and common sense' to find that wildlife 'take' includes 'deaths caused by automobiles.'" Resp. Br. 13 n.15; see also *id.* at 21. The context shows, however, that the court was concerned only with basing criminal liability on an act that was not done knowingly. Thus, in the passage immediately following the one quoted by respondents, the court observed: "As stated in one of the early decisions under the [MBTA], '[a]n innocent technical violation on the part of any defendant can be taken care of by the imposition of a small or nominal

Respondents' basic objection to the "harm" regulation is that it "focuses exclusively on the ultimate effect of the act on listed wildlife." Resp. Br. 14. In their view, "harm" should be construed to reach only purposeful conduct directed at wildlife because the "take" prohibition is concerned with the character of the actor's conduct, rather than its effect on the species. *Ibid.* That view ignores the central purpose of the ESA: to conserve endangered and threatened species. 16 U.S.C. 1531(b). The Act accomplishes that purpose in part by prohibiting conduct that undermines a listed species' continuing survival. For example, the prohibition against wounding a protected species is not intended to save individual animals from suffering pain. Wounding is prohibited because it is likely to impair the animal's ability to engage in activity essential to its own survival and that of its offspring, *e.g.*, by impairing its ability to forage for food, build a shelter, and breed. Thus, wounding a protected species violates the ESA even if it is the unintended consequence of otherwise lawful activity directed at a different object. The character of the conduct may bear on the appropriate sanction, but not on the existence of a violation.[4]

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fine.' Such situations properly can be left to the sound discretion of prosecutors and the courts." 572 F.2d at 905 (citation omitted).

[4] Respondents argue (Br. 14) that the "harm" regulation "confuses some remote effect on a species' population with a concrete effect on some member of that species" and "also ignores the role of intervening acts in bringing about that generalized effect." Those issues, however, are properly addressed not by categorically excluding all harms to wildlife that are caused by habitat modification from the statutory "take" prohibition, but by applying principles of proximate causation, based on the regulation's condition that habitat modification is covered only if it "actually kills or injures wildlife" by significantly impairing essential behavioral patterns. Compare *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 115 S. Ct. 1043, 1049-1050 (1995); see,

Because the terms that accompany "harm" in the statutory definition of "take" are not limited to purposeful acts directed at wildlife, there is no merit to respondents' argument that the concededly broad term "harm" should be narrowly construed in that manner by application of *noscitur a sociis*.[5] A narrow construction that excluded

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e.g., *Forest Conservation Council* v. *Rosboro Lumber Co.*, No. 94-35070 (9th Cir. Mar. 24, 1995); *Marbled Murrelet* v. *Pacific Lumber Co.*, No. C-93-1400-LCB (N.D. Cal. Feb. 27, 1995), slip op. 55-60; Gov't Br. 45-46. Respondents, moreover, ignore the distinction between a violation of the ESA that is proven through indirect or circumstantial evidence (such as by proof of a population decline), and a situation in which there was no ESA violation at all because there was no causal link between the conduct and injury to wildlife.

[5] Contrary to respondents' contention (Br. 15 & n.17), FWS's discussion of *ejusdem generis* when it first proposed a revision of the harm regulation in 1981 (see J.A. 58) did not reflect an agreement with their position. FWS's interpretation of "take" included negligent conduct (J.A. 60) and habitat modifications that result in the actual killing or injury of wildlife (J.A. 61 & n.2, quoting *TVA* v. *Hill*, 437 U.S. 153, 165 n.16, 184 n.30 (1978)).

In the same footnote, respondents rely on *United States* v. *Hayashi*, 22 F.3d 859 (9th Cir. 1993), which construed "harass" and other forms of "take" under the Marine Mammal Protection Act of 1972 (MMPA), 16 U.S.C. 1361 *et seq.* See Gov't Br. 25-26 & n.13. The Ninth Circuit's conclusion that those terms connote "direct intrusions" meant something different from what respondents appear to mean by "directed at." For example, the *Hayashi* court understood hunt, capture and kill to involve "direct and significant intrusions upon the normal, life-sustaining activities of a marine mammal," explaining that "killing is a direct and permanent intrusion, while hunting and capturing cause significant disruptions of a marine mammal's natural state"; that "[t]o 'take' a marine mammal strongly suggests a serious diversion of the mammal from its natural routine"; and that the MMPA was aimed at "protecting natural animal behavior." 22 F.3d at 864, 866. The ESA "harm" regulation, which covers significant habitat modification or degradation that "actually kills or injures" wildlife by

all harm caused by habitat modification would also be inconsistent with Congress's intent to define "take" "in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife," S. Rep. No. 307, 93d Cong., 1st Sess. 7 (1973); see also H.R. Rep. No. 412, 93d Cong., 1st Sess. 11, 15 (1973), and with the central role that habitat protection plays throughout the Act. Gov't Br. 7-9, 24.[6]

"significantly impairing essential behavioral patterns," is consistent with that view.

[6] Respondents erroneously rely (Br. 30-31) on the failure by the Senate committee to include in its bill certain language contained in another bill that respondents assert was "very similar" to the "harm" regulation. As we have explained (Gov't Br. 28-29), the other bill was significantly broader than the regulation because it would have barred habitat modification per se, without regard to whether there was an ensuing effect on protected species. Respondents suggest (Br. 31 n.39) that the committee's omission of the broader provision is explained by the statements of "several legislators" expressing disapproval of the inclusion of habitat modification in the "take" prohibition. They cite, however, only one statement, by Senator Stevens, and that ambiguous remark does not support their position. The subject of his remark was whether a single bill should cover endangered flora as well as fauna, not the definition of "take" applicable to fauna. Thus, the unexplained fate of the bill proposed early in the legislative process sheds little light on congressional intent. Cf. *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483, 1492, 1495-1496 (1994).

Respondents also suggest (Br. 29 n.35, 30) that the legislative history of the 1973 Act is barren of discussion specifically relating to the precise issue here because no reasonable person could have imagined that the statutory text would support the Secretary's interpretation. That assertion is disproved by respondents' citation with approval (Br. 34 n.41) to an article, published before the Secretary's interpretation was proposed, that recognized that "harm" *could* be construed to encompass actions, such as timber harvesting, that destroy habitat. R. Lachenmeier, *The Endangered Species Act of 1973: Preservation or Pandemonium?*, 5 Envtl. L. 29, 39, 72 (1974). Furthermore, because respondents have the burden under *Chevron*

B. Respondents' narrow view of "harm" likewise cannot be squared with the subsequent amendments to Sections 7 and 10 of the ESA that specifically addressed the taking of protected species. As discussed in our opening brief (at 30-33), this Court's decision in *TVA* v. *Hill* provided the impetus for the 1978 amendments that created the process for exempting federal actions from both Section 7 and 9. The Tellico Dam at issue in *TVA* v. *Hill* was not "directed at" wildlife, yet it would have modified the snail darter's habitat to the point of rendering it extinct. For that reason, as the Court recognized (437 U.S. at 184-185 & n.30), completion of the dam would have constituted a prohibited taking under the Secretary's regulation that defined "harm" to include "significant environmental modification or degradation" that kills or injures wildlife. Gov't Br. 30-31. Congress's recognition that such a project would require an exception to the Section 9 "taking" prohibition and implementing "regulations" (see 16 U.S.C. 1536(*o*) (Supp. III 1979))—including the "harm" regulation (see Gov't Br. 32-33 & n.20)—confirms that "take" encompasses habitat modification that actually kills or injures wildlife.

The 1982 amendments also furnish compelling grounds for rejecting respondents' contention that a prohibited taking includes only purposeful conduct specifically directed at wildlife. In 1982, Congress added to Section 10 a provision for the Secretary to issue permits allowing "any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is *incidental to*, and *not the*

U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), of demonstrating either that Congress expressed its intent with respect to the precise issue or that the Secretary's interpretation is unreasonable, the absence of legislative history contrary to the Secretary's interpretation cuts against their position.

purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. 1539(a)(1)(B) (emphasis added). That statutory text is inconsistent with respondents' notion that takings that are not purposeful and are not directed at wildlife (*e.g.*, are "incidental" to otherwise lawful land use) are not covered by the taking prohibition in 16 U.S.C. 1538(a)(1)(B) in the first place. Similarly, respondents' contention that the taking prohibition is concerned with the character of the actor's conduct, not its effect on the species, is refuted by the statutory requirement that an "incidental take" permit may be issued only if the Secretary finds that "the applicant will, to the maximum extent practicable, minimize and mitigate the *impacts* of such taking." 16 U.S.C. 1539(a)(2)(A) and (B)(ii) (emphasis added); see also Gov't Br. 38-39 & nn.25-26 (discussing parallel 1982 amendments to 16 U.S.C. 1536(b)(4) and (*o*), as well as other amendments building on "harm" regulation).

Respondents suggest that Congress enacted the exempting mechanisms for incidental takes in 1982 only to address those instances in which a listed species is inadvertently captured or targeted while the actor is hunting, fishing or trapping nonlisted species. That explanation is untenable. "Incidental takes" are "situations in which it is known that a taking will occur if the other activity is engaged in but such taking is incidental to, and not the purpose of, the activity." H.R. Rep. No. 567, 97th Cong., 2d Sess. Pt. 1, at 31 (1982). The foreseeability of incidental takes shows that Congress was not addressing accidental killings. Moreover, the House Report explains that Section 10(a) enables "private land owners" to address "situations where the unintentional taking may occur on private lands owned by a developer who has no need of a Federal permit." *Id.* at 15; accord *id.* at 31. No private landowner expressed concern that Section 9 interfered with his hunting, trapping or fishing

for nonlisted species on private lands,[7] and incidental takes that result from commercial fishing, to which respondents refer (Br. 42), are not ordinarily associated with private land ownership or development.

The incidental take that provided the model for Section 10(a) was the conversion into a housing complex of an undeveloped tract that served as habitat for listed butterflies. Yet because the bulldozing and land-clearing were "ordinary land use activities" that were not "directed at" any wildlife or conducted with a predatory purpose, those activities, despite their seriously adverse impact on the butterflies, would not have constituted a "take" under respondents' narrow interpretation. Respondents suggest (Br. 41-42, 43 n.51) that Congress focused on habitat only because it intended to prescribe a habitat conservation *remedy* for takings of listed species that inadvertently occur as the result of actions undertaken for the purpose of killing or injuring nonlisted species. That suggestion cannot be squared with Congress's recognition that in some instances habitat modification can itself constitute a "take" that would in turn require a habitat conservation plan to mitigate adverse impacts. Gov't Br. 35-38.[8]

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[7] Timber industry witnesses, however, did express concern that the "take" prohibition interfered with private timber harvests and attendant land uses that were not undertaken for the purpose of killing or injuring wildlife, yet had that unintended effect. See Gov't Br. 37 & n.23; *id.* at 31 & n.18.

[8] Amici California, et al., implausibly suggest (Br. 26) that Congress believed the land-clearing at the housing development would have killed or injured listed butterflies, not by destroying their habitat, but by physical collisions of earthmoving equipment with butterflies or larvae. The extensive discussion of the project in the Conference Report makes clear that Congress understood that the ESA posed an obstacle to the project because it would seriously impair the butterflies'

Congress's refinement of the ESA through the 1978 and 1982 amendments that directly addressed Section 9 takings constitutes a ratification of the statutory interpretation embodied in the "harm" regulation. At the very least, those amendments strongly reinforce the reasonableness of the Secretary's interpretation, and therefore require that the regulation be sustained under *Chevron*.[9]

The present case is not, as respondents suggest (Br. 40-41), like *Brown* v. *Gardner*, 115 S. Ct. 552, 556-557 (1994), in which there was no "evidence to suggest that Congress was even aware of the [agency's] interpretive position." There is ample evidence that Congress was aware both of the agency's interpretation of "harm" as including certain incidental takes that could be characterized as habitat modification, and of private landowners' dissatisfaction with that interpretation. See Gov't Br. 31-40; see also Resp. Br. 43 & n.51 (acknowledging awareness manifested in Senate Report and hearings); *Qualitex Co.* v. *Jacobson Products Co.*, No. 93-1577 (Mar. 28, 1995), slip op. 13-14 (relying on amendments enacted against "background" of administrative and judicial interpretation "strongly

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"habitat," including "their food plants." H.R. Conf. Rep. No. 835, 97th Cong., 2d Sess. 30-32 (1982); Gov't Br. 35-36.

[9] Citing *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U.S. 83, 101 (1991), respondents suggest (Br. 44) that even if Congress in 1982 acted on the assumption that "harm" could reach some land uses, it would be legally irrelevant. *West Virginia* is inapposite because it addressed an argument that congressional intent should be divined from a later Congress's treatment of an issue in a different statute. In this case, by contrast, Congress enacted amendments to the ESA itself in 1978 and 1982 that both used the word "take" or "taking" (which had already been defined in important part in the "harm" regulation) and established exempting mechanisms that are premised upon an interpretation of "take" that includes killing and injury of protected wildlife that result from significant habitat modification.

suggest[ing]" that statutory language had "come to include" color). Nor is this a situation in which Congress remained silent. It affirmatively responded to the controversy by amending the Act to allow "incidental takes," subject to consultation under Section 7 or the permit process under Section 10. Compare *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 136-139 (1985); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-386 (1969).[10]

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[10] Respondents invoke the rule of lenity to support their argument that "harm" should be narrowly construed. Resp. Br. 28-29, citing *United States* v. *Thompson/Center Arms Co.*, 112 S. Ct. 2102 (1992), and *Crandon* v. *United States*, 494 U.S. 152, 157-158 (1990). Respondents did not make that argument below, and it is in any event without merit. First, this case involves a facial challenge to a regulation issued by the agency charged with administering the Act, not an application of the "take" prohibition in the context of particular conduct alleged to be in violation of the Act, as in *Thompson/Center Arms* and *Crandon*. The origins of the rule of lenity in criminal prosecutions counsel against its invocation in this quite different setting.

Second, even where it applies, the rule of lenity comes into play only at the end of the process, if the statute remains ambiguous after utilizing other tools of statutory construction. See, *e.g.*, *Smith* v. *United States*, 113 S. Ct. 2050, 2059-2060 (1993). Here, as we have explained, the text, structure and history of the Act refute respondents' contentions that the "take" prohibition applies only to purposeful conduct directed at protected wildlife, and that it categorically excludes all actual killings or injuries of wildlife that result from significant habitat modification or degradation. At the very least, the Secretary's longstanding interpretation is reasonable, and therefore is controlling under *Chevron*. Cf. *Ehlert* v. *United States*, 402 U.S. 99, 105 (1971) (deferring to agency interpretation in criminal prosecution). And because that interpretation is published in the Code of Federal Regulations, the notice goal of the rule of lenity is satisfied.

Third, respondents' position that the "take" prohibition is limited to purposeful conduct directed at wildlife is essentially an argument that

C. The remaining efforts by respondents and their amici to replace the meaning of "harm" that is now firmly embedded in the Act are without merit.

1. Respondents contend (Br. 25-26) that if the "take" prohibition applies to the killing or injuring of wildlife as a result of significant habitat modification, then it "subsumes" Section 7(a)(2) and renders that section "surplusage." Section 7(a)(2) requires every federal agency, in consultation with FWS, to ensure that actions it authorizes, funds or carries out are not likely to "jeopardize the continued existence" of a listed species or destory or adversely modify habitat of the species that has been determined by the Secretary to be critical.

In respondents' view, if everyone has a duty under Section 9 to avoid inadvertently injuring even one member of a listed species, there is nothing left of the separate federal duty to avoid actions that jeopardize the species' continued existence. Respondents misapprehend the statutory scheme. The "no jeopardy" standard establishes an absolute level of protection for a species as against federal actions covered by Section 7(a)(2) (in the absence of an exemption granted by the Endangered Species Committee under Section 7(h)). The "take" prohibition in Section 9, by contrast, is not absolute; by virtue of the 1982 amendments, FWS may allow "incidental takes" of a protected species, either in connection with federal actions through the consultation process under Section 7, or in

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scienter must be shown in every application of that prohibition, even in civil injunctive actions where scienter typically is irrelevant. The ESA's criminal provision, however, contains its own scienter requirement ("knowingly"), which furnishes an additional element of a criminal offense. Compare *Thompson/Center Arms*, 112 S. Ct. at 2110 (plurality opinion) (criminal offense had no additional element of willfulness). Accordingly, the rule of lenity furnishes no basis for reading a scienter element into the basic "take" prohibition.

connection with non-federal actions through the issuance of incidental take permits under Section 10. See 16 U.S.C. 1536(b)(4), 1539(a)(1)(B) and (2). In addition, because the Section 9 "take" prohibition does not apply of its own force to threatened species (such as the northern spotted owl), but has instead been extended to such species by regulation under Section 4(d) (see Gov't Br. 5 & n.4), FWS may carve out exceptions to the "take" prohibition for threatened species. See pages 19-20, *infra*. FWS may not, however, carve out exceptions from Section 7(a)(2) for threatened species. Similarly, as we explain in our opening brief (at 41-44), the Secretary's interpretation of "harm" does not render superfluous the provision in Section 7(a)(2) for protection of critical habitat.

Several amici assert that inclusion of habitat modification resulting in death or injury to protected wildlife in the definition of "harm" leads FWS to substitute Section 9's harm restrictions for the designation of critical habitat pursuant to the provisions added to Section 4 of the ESA in 1978 and 1982, which require consideration of economic and other factors. See State Water Contractors Br. 11-15; Nat'l Ass'n of Home Builders Br. 4-10; Congressman Baker Br. 6-21. FWS's approach to designating critical habitat of course is not at issue in this case. In any event, amici are wrong in asserting that the Secretary's interpretation of "harm" limits the role of critical habitat. To the extent critical habitat plays a relatively limited independent role as a practical matter under the ESA, it is primarily because the comprehensive evaluation required by Section 7 to determine whether a species would be jeopardized necessarily entails evaluation of impacts on its habitat, whether or not critical habitat has been formally designated for the species under Section 4.

50 C.F.R. 402.02.[11] As a result, formal designation of critical habitat often is not necessary to address habitat modification in the Section 7 context, and "the protection provided by a critical habitat designation usually only duplicates the protection provided under the section 7 jeopardy provision." 57 Fed. Reg. 36,626, 36,627 (1992).[12]

Moreover, amici lose sight of the fact that the 1978 and 1982 amendments to the ESA, which added the provisions for designation of critical habitat on which they rely, also added the provisions (discussed above) that strongly reinforce the Secretary's interpretation of "harm" as including death or injury to wildlife that is caused by significant habitat modification. Congress therefore saw no inconsistency between the Secretary's interpretation

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[11] Amici State Water Contractors, et al., argue (Br. 15) that FWS could conclude that little economic impact is felt from critical habitat designation only if "harm" is defined to include death or injuries caused by habitat modification. However, the very critical habitat designations they cite explicitly state that the listing of a species and the concomitant duty to avoid jeopardy under ESA Section 7(a)(2) encompass most of the federal agency obligations regarding critical habitat. See, *e.g.*, 59 Fed. Reg. 65,260, 65,262, 65,274-65,275 (1994) (Delta smelt); 57 Fed. Reg. 36,626, 36,627, 36,630 (1992) (Sacramento River Winter-run Chinook salmon); *id.* at 1796, 1812-1813, 1831-1833 (northern spotted owl). The FWS's "incremental approach" to assessing the economic and other effects of a critical habitat designation has been challenged and upheld. *Trinity County Concerned Citizens* v. *Babbitt*, Civ. No. 92-1194 (D.D.C. Sept. 20, 1993).

[12] The clearest instance in which a designation of critical habitat can afford additional protection to listed species involves unoccupied potential habitat. Critical habitat is defined as including areas both "within" and "outside" the areas occupied by the species at the time of listing. 16 U.S.C. 1532(5)(A). In appropriate cases, designating unoccupied potential habitat can promote recovery of the species by providing for "natural range expansion into adjacent suitable habitat." 49 Fed. Reg. 38,904 (1984); see also 57 Fed. Reg. 36,627 (1992).

and the statutory provisions for designation of critical habitat. That conclusion is reinforced by the fact that in *TVA* v. *Hill*, which was the impetus for the 1978 amendments, this Court recognized that completion of the Tellico Dam would have violated both Section 7 (by jeopardizing the continued existence of the snail darter and destroying critical habitat the Secretary had designated for the species) *and* Section 9 (by taking the snail darter under the Secretary's "harm" regulation). See 437 U.S. at 161-162, 171-172, 184-185 & n.30. And as we have explained (Gov't Br. 32, 38, 44), Congress specifically accommodated the overlap of Sections 7 and 9 in this regard by enacting Section 7(*o*) in 1978 and reenacting it in 1982.

2. Some amici argue that "harm" should be narrowly construed to avoid questions under the Just Compensation Clause of the Fifth Amendment. See, *e.g.*, American Farm Bureau Fed'n Br. 20-26. This Court rejected the same argument in *Riverside Bayview Homes*, in holding that adjacent wetlands are included within the Clean Water Act's prohibition against the discharge of pollutants into "waters of the United States." There, as here, the statute proscribed conduct in absolute terms, with exceptions available by securing a federal permit. This Court explained that the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking because "the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired," and "even if the permit is denied, there may be other viable uses available to the owner." 474 U.S. at 127.

Amici's reliance on *Bell Atlantic Tel. Cos.* v. *FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994), is misplaced. There, the broader interpretation of the regulation would *in every case* have resulted in a Fifth Amendment taking. Compare

Riverside Bayview Homes, 474 U.S. at 128 n.5 (distinguishing *United States* v. *Security Industrial Bank*, 459 U.S. 70 (1982), on that ground). Here, there is no identifiable category of situations in which application of the "harm" regulation will necessarily (or even probably) result in a Fifth Amendment taking. In fact, amici do not identify a single instance (and we know of none) in which a plaintiff has even filed a claim alleging, much less proven, a Fifth Amendment taking as the result of an application of the "harm" regulation that inhibited land use.[13]

3. Respondents assert that Congress would not have intended that the ESA interfere with the use of private property because the land use activities affected by the regulation are not otherwise substantially regulated. Resp. Br. 27-28. To the contrary, timber harvesting on non-federal lands, which is the activity that respondents allege the "harm" regulation interferes with, often requires a permit. See, *e.g.*, *Forest Conservation Council* v. *Rosboro Lumber Co.*, No. 94-35070 (9th Cir. Mar. 24, 1995), slip op. 3303; J.A. 19; see also Resp. Br. 9 n.9.

Respondents' assumption that Congress invariably acts with the intent to avoid any effect on private land use also

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[13] The suggestion by amici Arizona (Br. 24-25) and Texas (Br. 8-11) that the "harm" regulation impermissibly intrudes on state sovereignty is foreclosed by *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 283-293 (1981). Arizona's argument (Br. 15-18) that the regulation is unconstitutionally vague is not presented here. The courts below rejected respondents' vagueness challenge (Pet. App. 24a, 47a-51a, 83a-85a), and respondents did not seek review of that holding. In any event, the court of appeals correctly held that unless a regulation is vague in all its applications, it cannot be declared void on its face, see *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982), and that the "harm" regulation contains limiting features that prevent it from being vague in all applications. Pet. App. 49a-50a.

is without foundation in law or experience—especially where, as here, significant environmental values of national concern are present. See, *e.g.*, *Riverside Bayview Homes* (Clean Water Act); *Virginia Surface Mining* (Surface Mining Control and Reclamation Act of 1977). By amending the ESA in 1982 "to increase the flexibility in balancing species protection and conservation with development projects," H.R. Rep. No. 567, *supra*, at 10, Congress recognized that land use is affected by the Act. The prohibition on the taking of species, in conjunction with the program for authorizing incidental takes, casts jurisdiction over a wider range of activities than ultimately will be restricted. This approach rationally and flexibly addresses the inherent difficulties involved in defining prohibited conduct in light of the wide diversity of species and the range of circumstances in which they live. FWS's informal discussions with landowners and the formal Section 10 permit process furnish the means by which the balance can be struck on a case-by-case basis, so that land use activities may continue while at the same time ensuring that the number of "takes" that result will be minimized.

4. Respondents and their amici speculate about possible applications of the "harm" regulation, and they urge the Court to invalidate it in order to prevent such applications. This case, however, involves a facial challenge to the regulation (J.A. 28; Pet. App. 24a), and the regulation therefore must be sustained unless respondents establish that "no set of circumstances exists under which the [regulation] would be valid." *Reno* v. *Flores*, 113 S. Ct. 1439, 1446 (1993); see also *Anderson* v. *Edwards*, No. 93-1883 (Mar. 22, 1995), slip op. 11 n.6; Gov't Br. 19. This respondents have failed to do.

There is no merit to respondents' suggestion (Br. 37-38) that this case challenges a concrete application of the

"harm" regulation to respondents through "owl guidelines." In July, 1990, shortly after the northern spotted owl was listed as a threatened species, FWS prepared a document entitled "Procedures Leading to Endangered Species Act Compliance for the Northern Spotted Owl" (J.A. 36-48). That document provided information on various aspects of ESA compliance vis-a-vis the owl, and included a section entitled "Incidental Take Guidelines under Sections 7 and 10" (J.A. 41-44). It is that section that respondents refer to as the "owl guidelines." The courts below did not make any findings regarding the application of those guidelines (or the "take" prohibition) to particular parcels of land.

Moreover, respondents fail to mention that they brought a separate suit challenging the same "owl guidelines," on the grounds that they were based on a definition of "harm" that was inconsistent with the ESA and had been developed without the notice and comment allegedly required by the Administrative Procedure Act, 5 U.S.C. 553(b). FWS subsequently withdrew the guidance. The district court then dismissed the complaint as moot, holding that FWS's rescission of the guidance provided the plaintiffs with all the relief they sought. *Sweet Home Chapter of Communities for a Great Oregon* v. *Lujan*, Civ. No. 91-2218 (D.D.C. Feb. 27, 1992), slip op. 5.

On February 17, 1995, FWS proposed new regulations under Section 4(d) of the Act to address the application of the "take" prohibition to the northern spotted owl. See Gov't Br. 5 & n.4. Among other things, the special rule would exempt private timber harvests from that prohibition in defined areas. For example, on non-federal land located in the spotted owl's range but outside specified zones where full protection is still needed, the rule would exempt incidental takings unless they result from harvesting within a 70-acre area closest to an owl's site

center (*i.e.*, nest tree, or primary roost for non-nesting owls). 60 Fed. Reg. 9484, 9485 (1995).[14] Within special zones that require somewhat greater protection, small landowners (owning less than 80 acres) would be exempted with respect to incidental takings resulting from logging activities outside an owl's site center. *Id.* at 9485. The proposal also would provide additional flexibility for small landowners, such as a program for owners of between 80 and 5000 acres of forest lands within the special zones to acquire a Section 10 permit with a minimum of red tape by using a "short form" habitat conservation plan. *Ibid.*

The proposed rule for the spotted owl is just one example of FWS's ongoing policy to assist the public in determining whether a particular activity would constitute a prohibited act under Section 9 and to streamline the process for obtaining exemptions. See, *e.g.*, 59 Fed. Reg. 34,272 (1994) (policy statement committing agencies to provide guidance and assistance to public to avoid liability for incidental takes); J.A. 43-48. Another example has been implemented in Texas, where qualified landowners may complete a simplified application form, contribute to the City of Austin Balcones Canyonlands Conservation Fund for mitigation of any taking, and usually within two months receive a permit to take listed species incidental to construction activities. See, *e.g.*, 59 Fed. Reg. 66,555-66,556 (1994) (permit application notices).

Respondents contend (Br. 37 n.45) that this case differs from *Reno* v. *Flores* because here "[t]here is no dispute

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[14] Even within the 70-acre core areas, harvest activities would not automatically constitute a prohibited taking. The proposed rule simply does not exclude such actions from coverage should a taking occur. As a biological matter, there is a substantial risk that such activities would actually kill or injure spotted owls. But as a legal matter, the

about [the "harm" regulation's] manner of application and scope." Even a cursory reading of the amici briefs dispels any notion that there is unanimity of view as to the scope and application of the regulation. Contrary to respondents' suggestion (Br. 36), moreover, here, as in *Reno* v. *Flores*, there are no findings of fact or a record concerning the agency's enforcement. Amici's scattershot introduction of material at this late stage can only provide a truncated, one-sided (and, we believe, inaccurate) view of the facts.[15] In any event, amici's arguments go beyond the scope of a facial challenge. "As the Court of Appeals * * * invalidated the regulation on its face, [this Court has] no occasion to consider whether it is valid as applied." *Bowen* v. *Yuckert*, 482 U.S. 137, 154 n.12 (1987).

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government or plaintiff in a citizen suit seeking to enforce the "take" prohibition would have the burden of proving a "take."

[15] For example, citing *Idaho Farm Bureau Fed'n* v. *Babbitt*, 839 F. Supp. 739 (D. Idaho 1993), appeals pending, Nos. 94-35164, 94-35230 (9th Cir.), amici American Farm Bureau Fed'n, et al., assert (Br. 15) that in 1985, FWS banned farmers in southwestern Idaho from pumping groundwater in order to protect a listed springsnail. To the contrary, existing groundwater pumping was never banned, and a moratorium placed in 1982 on new pumping applications was imposed by the State of Idaho, not FWS or any other federal agency, for reasons unrelated to any endangered species concerns. 58 Fed. Reg. 5938, 5941-5942 (1993). Moreover, the springsnail at issue was not even listed until January 25, 1993, years after the alleged ban on new groundwater pumping was imposed. 839 F. Supp. at 743-744.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

APRIL 1995

(4)

No. 94-859

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IN THE
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OCTOBER TERM, 1994

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Petitioners,

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF AMICI CURIAE SCIENTISTS JOHN CAIRNS, JR., HAMPTON L. CARSON, JARED M. DIAMOND, THOMAS EISNER, STEPHEN JAY GOULD, DANIEL H. JANZEN, JANE LUBCHENCO, ERNST MAYR, CHARLES D. MICHENER, GORDON H. ORIANS, STUART L. PIMM, DANIEL SIMBERLOFF, JOHN W. TERBORGH, EDWARD O. WILSON IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

WHETHER HABITAT DESTRUCTION, WHICH IS THE MAJOR CAUSE OF SPECIES EXTINCTION, "HARMS" ENDANGERED SPECIES WITHIN THE MEANING OF SECTION 9 OF THE ENDANGERED SPECIES ACT OF 1973?

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BRIEF OF AMICI CURIAE SCIENTISTS IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE*

Amici are prominent scientists in the field of biology, zoology, entomology, paleontology, and ecology. They have special knowledge of the habitat needs of endangered species, and issues directly before this Court. *Amici* believe the court below reached sweeping conclusions of law based upon unfounded and scientifically insupportable suppositions regarding the manner in which endangered species may be harmed. Species are "harmed," within any reasonable scientific definition of that term, by significant modification or degradation of habitat, especially where

habitat modifications actually kill or injure wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering, as provided in the Endangered Species Act (ESA) regulations defining harm. 50 C.F.R. § 17.3.

Amici include, in alphabetical order:

John Cairns, Jr., University Distinguished Professor of Environmental Biology, and Director of the University Center for Environmental and Hazardous Materials Studies, Virginia Polytechnic Institute and State University. Dr. Cairns is past Curator of Limnology at the Academy of Natural Sciences of Philadelphia, has served on 17 National Research Council committees, two as chair, and is presently serving on 14 editorial boards. He has over 1200 publications, including 48 books.

Hampton L. Carson, Professor Emeritus of Genetics, Department of Genetics and Molecular Biology, John A. Burns School of Medicine, University of Hawaii at Manoa. Dr. Carson's research has focused on evolutionary genetics, cytogenetics, population genetics, and the evolution of *Drosophila*.

Jared M. Diamond, Professor and Vice Chair, Department of Physiology, UCLA Medical School. Dr. Diamond is an explorer of New Guinea bird fauna, and inventor of the concept of assembly rules in community organization. Although his formal training was in physiology and membrane biophysics, Dr. Diamond has pursued a parallel career in ecology and evolutionary biology. Since 1977, he has devoted much of his time to popular science writing including the recently published book *The Third Chimpanzee*.

Thomas Eisner, Jacob Gould Professor of Biology, and Director of the Institute for Research in Chemical Ecology, Cornell University. Dr. Eisner is the founder of chemical ecology. He currently serves as an advisor for World Resources Institute, Committee for the National

Institutes of the Environment, and Center for Plant Conservation, and is former president of the American Society of Naturalists, and Chairman of the Section of Biology of the American Association for the Advancement of Science.

Stephen Jay Gould, Alexander Agassiz Professor of Zoology, Professor of Geology, and Curator of Invertebrate Paleontology at the Museum of Comparative Zoology, Harvard University. Dr. Gould has been awarded over thirty honorary doctoral degrees, and has received numerous literary awards for such renowned natural history books as *The Panda's Thumb* and *Wonderful Life.* He has popularized evolutionary biology, and originated the thesis of punctuated equilibrium.

Daniel H. Janzen, Professor of Biology, University of Pennsylvania. Dr. Janzen has spent the past 28 years focusing on the interactions between animals, particularly insects, and plants, and pioneering research to regenerate the deciduous forests of Central America. He initiated the parataxonomist program at the National Institute of Biodiversity in Costa Rica, training rural Costa Ricans in the basics of insect and plant taxonomy used in a national biodiversity program.

Jane Lubchenco, Distinguished Professor of Zoology, Oregon State University. Dr. Lubchenco is President-Elect of the American Association for the Advancement of Science, past President of the Ecological Society of America, and was named Oregon Scientist of the Year in 1994 by the Oregon Academy of Sciences. She is a Pew Scholar in Conservation and the Environment, a MacArthur Fellow, and her research on biodiversity of seaweeds and plant-herbivore interactions was named a Science Citation Classic.

Ernst Mayr, Alexander Agassiz Professor of Zoology, Emeritus, at the Museum of Comparative Zoology, Harvard University. Dr. Mayr is the architect of Neo-Darwin-

ism and the biological-species concept. He has produced 640 publications (including 16 books) in biology, ornithology, evolution, and systematics, including the influential *Systematics and the Origin of Species, Animal Species and Evolution,* and *Principles of Systematic Zoology,* and is a receipient of the National Medal of Science, the Balzan Prize, and a dozen honorary degrees.

Charles D. Michener, Watkins Professor Emeritus of Entomology, and Systematics and Ecology, University of Kansas. Dr. Michener has received two Guggenheim fellowships and a Fulbright research grant. His principal research fields include bee behavior, bee systematics, and principles of systematics, and he has over 375 publications.

Gordon H. Orians, Ecologist and Conservation Biologist, Department of Zoology, University of Washington. Dr. Orians' publications are focused on the fields of behavioral ecology, plant-herbivore interactions, community ecology, the ecology of rare plants, and human ecology.

Stuart L. Pimm, Professor of Zoology, University of Tennessee. Dr. Primm is a theoretical population biologist and ecologist, 1993 Pew Scholar in Conservation and the Environment, and author of *The Balance of Nature? Ecological Issues in the Conservation of Species and Communities.* He leads projects protecting endangered species in Hawaii and Florida.

Daniel Simberloff, Robert O. Lawton Distinguished Professor of Biological Science, Florida State University. Dr. Simberloff is a Fellow of the American Academy of Arts and Sciences, and a member of the Board of Governors of the Society for Conservation Biology. He serves on the editorial board of numerous scientific publications, and is the author of 161 scientific papers. He is a pioneer of island biogeography, and has published original research on the effects of habitat fragmentation on extinctions and the species-area curve.

John W. Terborgh, Director of the Center for Tropical Conservation, Duke University. In 1992, Dr. Terborgh was a MacArthur Fellow, and Pew Scholar in Conservation and the Environment. He is a botanist and a zoologist, and has operated a field station in the Manu National Park in Peru since 1973, where he has overseen the research of more than 100 investigators.

Edward O. Wilson, Curator of Entomology at the Museum of Comparative Zoology, and Frank B. Baird Jr. Professor of Science, Harvard University. Dr. Wilson's research interests include evolutionary sociobiology, biogeography, and ethical philosophy. He has written over a dozen books including *On Human Nature* and *The Ants* for which he was awarded Pulitizer Prizes in 1979 and 1991, respectively. His most recent book, *The Diversity of Life,* has been described as the sequel to Darwin's *Origin of Species.*

SUMMARY OF ARGUMENT

As scientists who have devoted our professional lives to the study of nature, and to the conservation of biological diversity for the benefit of humanity, we are deeply troubled by the Court of Appeals decision that habitat modification does not constitute "harm" within the meaning of the Endangered Species Act (ESA). Habitat loss is the major cause of species extinction in the United States and throughout the world. The rate of extinction is accelerating in direct response to the relentless destruction, degradation, and fragmentation of habitat, especially in the tropical forests, but here in the United States as well. As *Amicus* Edward O. Wilson has said, "The one process now going on that will take millions of years to correct is the loss of genetic species diversity by the destruction of natural habitat." [1] And it is we humans who cause this phenomenon.

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[1] Edward O. Wilson, *Biophilia,* Harvard University Press, 121 (1984).

This loss of biological wealth ought to concern us all gravely. Although we have discovered only a fraction of the species that exist, and have studied but a small proportion of those, we already have realized great benefits in terms of food, medicine and other valuable products. Yet we may never know what other benefits are being lost—what new miracle drug or pest-resistant food crop lies waiting to be discovered in some unlikely place—because we are destroying species and ecosystems faster than we can catalog them. At the most basic level, we are destroying knowledge when we extirpate a species. The tragedy is that much of this loss could be avoided by developing a better data base on biological resources and carefully planning human activities to avoid or at least reduce their impact.

Against this backdrop of the need for even stronger protections for our beleaguered natural world, we are utterly at a loss to understand how a statute with the stated purpose of "providing a means whereby the ecosystems upon which threatened and endangered species depend may be conserved," 16 U.S.C. § 1531(b), could be read to exclude protection of habitat on "nonfederal" lands that is being destroyed, degraded, and fragmented by unrestrained human activity. This is particularly disturbing when one considers that as many as half of all listed species are known to occur *only* on nonfederal lands. In some cases, entire ecosystems may exist only on nonfederal lands. We are not inclined to attribute to Congress an intent to write off all of this biological wealth on the speculative notion that its conservation would necessarily entail an undue burden on private property. Surely, some accommodations can be reached to avoid an either/or approach to the issue.

We understand that reasonable people—and courts—can disagree over the meaning of language. This case is certainly proof of that. But when it comes to the issue of whether habitat modification actually harms species, there

is no ambiguity in our minds. Extinction truly is the final environmental insult.

In our view, the Court of Appeals was wrong to focus its discussion of harm on the "direct application of force against the animal taken." 17 F.3d 1463, 1465 (D.C. Cir. 1994). In science, it matters little whether the fatal blow is delivered directly or indirectly, with malice aforethought or simple ignorance. Even the malicious killing of a single member of one of the most endangered species is not as deadly as the mistaken eradication of its last remaining habitat. It is the loss of the species that matters most in terms of biological diversity, and it is the conservation of habitat that matters most in terms of species survival and recovery.

There is no other law like the ESA. No law so boldly states the commitment to respect all forms of life, and strives to understand the human role in evolution. If the ESA does not protect habitat, wherever it be found, then it does not protect species, and it cannot succeed.

ARGUMENT

I. MORE THAN THE SURVIVAL OF INDIVIDUAL SPECIES IS AT STAKE IN THIS CASE: THE NATION'S COMMITMENT TO PRESERVING ITS BIOLOGICAL WEALTH IS ON THE LINE.

A. The Extinction Crisis.

We live in an era of extinction.[2] No one knows for certain how many species there are in the world, or the precise number that are disappearing daily from our midst. But there is general scientific consensus that we are losing global biodiversity at an accelerating rate, perhaps as many as 50 to 150 species *per day*.[3] If these trends con-

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[2] Edward O. Wilson, *The Diversity of Life*, W.W. Norton and Co., 280 (1993) (hereafter, *Diversity of Life*).

[3] W.V. Reid and K.R. Miller, *Keeping Options Alive: The Scientific Basis For Conserving Biodiversity*, World Resources Insti-

tinue, over a million species may vanish by the turn of the century.[4] Unless tropical deforestation is halted, we face the loss of 25 percent of the world's biological diversity by the year 2020.[5]

Of course, mass extinctions have happened before during earth's geological history, but this one is different. This is not the work of nature; it is the work of humans. Human population is growing at an exponential rate—5.6 billion today, an estimated 10 billion by 2050.[6] In response, resource consumption and waste disposal are escalating. The consequences for biodiversity are frightening. Current rates of extinction of birds and mammals are perhaps 1000 times what they would be in unperturbed nature.[7]

The loss can be measured many ways. Whole categories of organisms that emerged over the past 100 million years, among them condors, rhinoceros, manatees, and gorillas, are close to the end.[8] Humans rely in countless ways upon the goods and services nature provides. When we take a prescription to the pharmacy, there is a 50/50 chance that the medicine we take home was derived from

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tute, 37 (1989) (hereafter, *"WRI"*). The authors note that extinction rates vary considerably, but there is general consensus among scientists that whatever the precise rate, it is without precedent in recorded history.

[4] Peter H. Raven, "Our Diminishing Tropical Forests," in *Biodiversity* (Edward O. Wilson and Frances M. Peter eds.), National Academy Press, 119-122 (1988).

[5] *WRI, supra* note 3, at 45. Most of this loss would result from tropical deforestation.

[6] Laurie Ann Mazur, ed., *Beyond the Numbers: A Reader on Population, Consumption, and the Environment, Island Press,* 106 (1994).

[7] *WRI, supra* note 3, at 33.

[8] *Biophilia, supra* note 1, at 122.

a wild organism.[9] The commercial value of these medicinal products is more than $15 billion per year in the U.S. alone.[10] And this is just the tip of the iceberg. Of the estimated 30 million species that inhabit the earth, only a fraction (5%) have been identified, let alone studied for their beneficial properties, and yet many will disappear before we even know what has been lost.[11]

Some of the discoveries have been dramatic. From the rosy periwinkle, a nondescript tropical plant, came a breakthrough drug (vincristine) to treat childhood leukemia. From the humble Pacific yew, once burned as "slash" in the old growth forests of the Pacific Northwest, came taxol, a cancer fighting drug. From a simple willow came aspirin; from a lowly mold came penicillin; from common foxglove came the heart medicine digitalis. Even lethal species have their redeeming qualities. The venom of snakes and spiders provides us with useful antidotes. The desert pupfish, with its remarkable tolerance for extremes in temperature and salinity, may provide clues to understanding human kidney disease.[12]

Agricultural productivity is heavily dependent upon genetic diversity which, in turn, depends upon the preservation of habitat. It is essential that we conserve the areas where the wild relatives and diverse varieties of domesticated species grow. If this supply of genetic material is lost, cross-breeding to enhance agricultural produc-

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[9] Norman Meyers, *A Wealth of Wild Species: Storehouse for Human Welfare*, Westview Press, ix (1983).

[10] *Id.* at 5. This figure is based upon pre-1983 data, and is therefore likely to be understated.

[11] Testimony of Dr. Thomas Eisner, "Medicinal Uses of Plants: Protection For Plants Under the Endangered Species Act," *Hearing Before the Subcommittee On Environment and Natural Resources of the Committee on Merchant Marine and Fisheries, U.S. House of Representatives*, 103d Congress, 1st Session, Nov. 9, 1993, at 3.

[12] Meyers, *supra* note 9, at 116-117.

tivity will be impossible.[13] Such cross-breeding has been critical to the success of American agriculture. From 1930 to 1980, the use of genetic diversity accounted for at least one-half of a doubling in yields of rice, barley, soybeans, wheat, cotton, and sugar-cane; a three-fold increase in yields of corn, sorghum, and potato.[14] Genetic diversity is also a key to controlling pests. Due to evolutionary adaptation, pests are remarkably resistant to chemical controls. More than 400 species of pest now resist one or more pesticides,[15] and the proportion of U.S. crops lost to insects has approximately doubled—to 13 percent—since the 1940's, despite a two-fold increase in the use of pesticides.[16]

As important as diversity is at the genetic and species level, it takes on even greater significance at the ecosystem level. Natural aggregations of species are more than a collection of genetic material; they also provide ecological processes of enormous importance to humanity. Ecological processes include primary production (photosynthesis), decomposition, and maintenance of biogeochemical cycles (water, energy, nutrients and other chemical elements). The services these processes provide include maintenance of soil fertility, pest control, climate regulation, and pollution control.[17] Forested watersheds provide a useful example of the utilitarian value of the environmental services nature provides. The forest anchors the soil, controlling erosion and preventing flooding; it holds water,

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[13] *WRI, supra* note 3, at 25.

[14] Office of Technology Assessment, *Technologies to Maintain Biological Diversity*, OTA-F-330, United States Government Printing Office (1987).

[15] Robert May, "Evolution of Pesticide Resistance," 241 Nature 1441-49 (1985).

[16] Donald L. Plucknett and Nigel J.H. Smith, "Sustaining Agricultural Yields," 36 BioScience 40-45 (1986).

[17] *WRI, supra* note 3, at 4.

replenishing streams and aquifers and maintaining the hydrologic cycle; it stores carbon, helping reduce harmful atmospheric loadings; it provides habitat for commercially valuable species of fish—salmon in the Pacific Northwest, for example—and wildlife; and it helps purify the air. Remove the forest, through unrestrained clearcut logging, for example, and the ecological and economic consequences, though they may take time to manifest themselves, can be devastating. For an extreme example of this one need only consider the sad case of Haiti, once one of the richest colonies in the French empire, with exports greater than all combined exports from the American colonies, and now the poorest nation in the Western Hemisphere.[18] Though Haiti shares the island of Hispaniola with the Dominican Republic, and the two countries have much in common culturally and geographically, Haiti's domestic product per capita is only one-fourth the Dominican Republic's. The major difference is that Haiti has lost 90 percent of its forest, whereas the Dominican Republic, while perhaps not a model of conservation efforts, took firm measures to halt deforestation in time to avert the disasters that have befallen Haiti.

Closer to home, there are numerous examples of watershed degradation leading to serious economic harm. In the Douglas fir forests of the Pacific Northwest, the wholesale liquidation of the old growth forest that led to the listing of the northern spotted owl as a threatened species has also contributed to the catastrophic decline of the anadromous salmon fishery, once valued at $5 billion per year.[19] Excessive timber cutting in the headwaters of the Bull Run watershed on the Mt. Hood National Forest in Oregon has also reduced and contaminated the water

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[18] Thomas Lovejoy, "Species Leave the Ark One by One," in *The Preservation of Species*, B. Norton (ed.), Princeton University Press, 18-19 (1986).

[19] Steven Yaffe, *Lessons from the Spotted Owl*, Island Press, 21-45 (1993).

supply of the City of Portland, requiring it to install costly water treatment systems and purchase alternative water supplies.[20]

In sum, although the Court of Appeals showed little appreciation for the severity of the extinction problem, it is, in the truest sense of the word, a crisis. And it is not simply a crisis in the tropical forest, where half the world's biological diversity exists. Other ecosystems are under tremendous stress.

Freshwater habitats are being dramatically altered as rivers are impounded, and exotic species are introduced. In the Southeastern United States, for example, 40 to 50 percent of freshwater snails have been driven to near extinction, as a result of rivers being impounded, channelized and "straightened."[21] Forty percent of Hawaii's endemic plant species are threatened with extinction. Fifty-four percent of the nation's wetlands have been destroyed.[22] Twenty-five percent of our mangrove swamps have been lost to development and pollution. Every one of the desert fishes found in the Western United States is either currently listed or considered eligible for listing as a threatened or endangered species.[23]

Since the time of European settlement, some 500 species, subspecies and varieties have become extinct in the United States.[24] As of August, 1994, there are 895 domestic species of plants and animals (roughly evenly

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[20] G. Gregory Nokes, "Running Out At Bull Run," The Oregonian, D-1 (January 2, 1995).

[21] *WRI, supra* note 3, at 87.

[22] *Id.* at 127-28.

[23] Williams, et al., "Fishes of North America, Endangered, Threatened, or of Special Concern: 1989," 14 Fisheries 2-20 (American Fisheries Society) (1989).

[24] Council on Environmental Quality, *Twenty-First Annual Report*, 136-38, United States Government Printing Office (1990) (hereafter, *CEQ Report*).

divided) on the threatened or endangered list.[25] Another 3000 to 4000 are under consideration for listing.[26] Even relatively common species, such as songbirds and waterfowl, are experiencing sharp population declines due in part to habitat loss.[27] Alteration of the Everglades has reduced its wading bird population by 90 percent since 1947.[28] Truly, our wildlife heritage is in grave danger.

B. Habitat Loss Is the Major Cause of Extinction.

The data show that extinctions of plant and animal species have been rising in rough proportion to the loss of habitat.[29] As Michael E. Soulé, one of the leading conservation biologists of the day, has written: "Never in the 500 million years of terrestrial evolution has this mantle we call the biosphere been under such savage attack." [30]

Habitat loss, degradation, and fragmentation are the most important influences upon species extinction rates. Some 67 percent of all endangered, vulnerable and rare species of vertebrates (including fish), are threatened by habitat degradation or loss.[31] Habitat loss and degrada-

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[25] *Endangered Species Technical Bulletin*, U.S. Department of Interior, Fish and Wildlife Service, at 24 (July/August 1994).

[26] *CEQ Report, supra* note 24, at 136.

[27] *Diversity of Life, supra* note 2, at 256. ("From the 1940's to the 1980's, population densities of migratory songbirds in the mid-Atlantic United States dropped 50 percent, and many species became locally extinct.")

[28] Keith Schneider, "Returning Part of Everglades to Nature for $700 Million," The New York Times, March 11, 1991, at B10.

[29] William Ophuls and A. Stephen Boyan, Jr., *Ecology and the Politics of Scarcity Revisited*, 121, W. H. Freeman (1992).

[30] Michael E. Soulé and Brue A. Wilcox, *Conservation Biology*, Sinauer Associates, 7 (1987).

[31] Robert Prescott-Allen and Christine Prescott-Allen, *Sourcebook For a World Conservation Strategy: Threatened Invertebrates*, General Assembly Paper (United Nations Doc. GA 78110) (1978).

tion is an important factor in 90 percent of extinctions of freshwater fishes.[32]

The dusky seaside sparrow provides a stark case study of the deadly consequences of piecemeal habitat destruction.[33] First discovered in 1872, the dusky seaside sparrow thrived in its marsh habitat on Merritt Island, Florida, until human settlement began to encroach. Habitat alteration started in the 1920's. To control mosquitoes, the marshes were diked, flooding the sparrow's nesting habitat; to create pastures for cattle, the natural vegetation was burned, reducing its insect prey base; and to protect the livestock forage insecticides were sprayed, contaminating its food supply. By the late 1960's all that remained of its habitat were isolated patches in a sea of agricultural fields, and the dusky seaside sparrow was officially listed as an endangered species. In 1972, the State of Florida decided to build the Beeline Expressway through the heart of its last stronghold. Fill for the road was excavated from its habitat, leaving a landscape pockmarked with borrow pits and studded with spoil piles—a moonscape to a species that evolved in the pancake flat, organically rich marshes of coastal Florida. In 1975, in a last ditch effort to rescue the dusky seaside sparrow, the U.S. Fish and Wildlife Service created the St. John's National Wildlife Refuge on a tiny strip of land on Merritt Island. But even as the Service began acquiring the last bits of habitat, the population was spiraling downward. Between 1970 and 1979 the number of singing males surveyed plummeted from 143 to 9. A catastrophic series of wildfires—fueled by the dry pastures on the converted marshes—finished the job. In 1981 the five dusky

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[32] *Diversity of Life, supra* note 2, at 254.

[33] This account is taken from Herbert Kale, "A Status Report on the Dusky Seaside Sparrow," Bird Conservation, University of Wisconsin Press (1983); and Charles Cadieux, "The Dusky Seaside Sparrow," *These Are The Endangered,* The Stone Wall Press, Inc. (1982) (hereafter, *Cadieux*).

seaside sparrows remaining in the wild—all males, unfortunately—were taken into captivity. In 1987, Orange Band, the last member of its species, quietly passed into history, in a cage at Disney World.[34]

The dusky seaside sparrow did not perish from any direct injury. It was not hunted for sport or killed out of spite. It was not the victim of any intentional act. The species died because its habitat was taken, a piece at a time, each increment justified to meet human needs, but with the end result the loss of a unique form of life.

The red-cockaded woodpecker may be facing a similar fate. This bird is a cavity nester, requiring mature pine trees of 60 years or more with heartwood that has been softened by the "redheart" fungus, allowing for excavation. Once common across the southeastern region of the country, its population has steadily declined as industrial logging spread through the region, removing stands of mature southern pine and replacing them with even-aged tree farms.[35] In 1986, the total size of the breeding population was estimated to be about 6000. Since then, the population has been declining by as much as 10 percent per year, a rate that obviously spells disaster unless recent conservation efforts—spurred by the ESA—are successful.[36]

Stepping back from concerns over the fate of individual species, there is a broader point to make regarding the importance of habitat. Scientists have been studying the relationship betwen habitat size, population viability and species diversity for a very long time. In a seminal work published in 1967, *amicus* Edward O. Wilson and his colleague, Robert MacArthur, described the theory of island biogeography, which posited that the number of

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[34] Mark Jerome, *A Shadow and a Song*, Chelsea Green Publishing Co., 173 (1987).

[35] *Cadieux, supra* note 33, at 95-9.

[36] *Diversity of Life, supra* note 2, at 229.

species tended to decline as habitat patches became smaller and more isolated. The authors concluded that extinction vulnerability is primarily a function of population size. This relationship has come to be known as the species-area curve.[37] A useful rule of thumb is that if habitat is reduced by 90 percent in area, roughly one-half of its species will be lost.[38] Though imperfect, the species-area curve is a useful tool to gauge the effect of habitat loss on the population size of species.

For example, in a comparison of fragmented versus unfragmented chaparral habitat in San Diego County, California, researchers determined, using the species-area curve, that approximately 75 extinctions of bird populations had occurred in 36 fragments over an 80-year period.[39] The fragments were not large enough to support viable populations, resulting in a series of local extinctions culminating in extinctions region-wide. In another Southern California study, scientists surveyed native and introduced plant species in 25 isolated patches of coastal scrub vegetation. Using statistical analyses, the researchers concluded that, "Area was the single most important predictor in native plant species richness."[40]

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[37] *Diversity of Life, supra* note 2, at 221. The Species-Area equation is $S = CA^z$, where S = the number of species, A = area and C and z are constants. The exponent *z* determines the slope of the curve and is the critical parameter in estimating extinction rates. Like any model, the species-area curve depends upon the accuracy of the assumptions made regarding the rate and pattern of, for example, deforestation, and the degree to which any conservation efforts are applied. The existence of a relationship between habitat loss and species extinction is, however, unquestionable.

[38] *WRI, supra* note 3, at 35.

[39] Douglas T. Bolger, *et al.*, "Occurrence Patterns of Bird Species in Habitat Fragments: Sampling Extinction and Nested Species Subsets," The American Naturalist (Feb. 1991).

[40] Allison S. Alberts, *et al.*, "Effects of Habitat Fragmentation on Native and Exotic Plants in Southern California Coastal Scrub," in *Interface Between Ecology and Land Development in California*, Southern California Academy of Sciences (1993).

C. Loss of Habitat on Nonfederal Lands Threatens Up to Half of Currently Listed Species with Extinction.

The Court of Appeals apparently thought that Congress meant to distinguish between federal and nonfederal lands [41] in terms of the habitat conservation requirements of the ESA. Specifically, the D.C. Circuit ruled that Congress intended to limit habitat conservation efforts on nonfederal lands to just two narrow provisions of the ESA.[42] One is through the Section 5 acquisition program, 16 U.S.C. § 1534; the other is through the Section 7 consultation process that applies to federal agencies.[43] However, since the majority of activity that occurs on nonfederal lands does not involve federal action, the practical effect of the Appeals Court's decision is to open the door to precisely the sort of habitat fragmentation that led to the extinction of the dusky seaside sparrow. It does not appear that the Appeals Court fully appreciated the consequences of this ruling, and it casts a dark cloud over the fate of a number of endangered species.

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[41] The term nonfederal land includes land owned by private parties, nonprofits, state and local governments, and Indian tribes.

[42] 17 F.3d 1463, at 1466 ("The Act addresses habitat preservation in two ways—the federal land acquisition program and the directive to federal agencies to avoid adverse impacts.")

[43] Among other things, Section 7 requires federal agencies to consult with the Fish and Wildlife Service and the National Marine Fisheries Service when their actions may affect listed species, and to insure that such actions are not likely to jeopardize the continued existence of such species or result in the adverse modification or destruction of designated critical habitat. 16 U.S.C. § 1536(a)(2). Although nonfederal lands can sometimes be protected as critical habitat, such designations have limited applicability. Critical habitat on nonfederal lands is protected only from the effects of federal or federally-permitted activities that are included in a consultation under Section 7. Only 105 species have habitat designated as critical, and 80 of these have a portion of their critical habitat on nonfederal lands. U.S. General Accounting Office, "Endangered Species Act: Information on Species Protection on Nonfederal Lands," GAO/RCED-95-16, U.S. Government Printing Office, 4-5 (Dec. 1994) (hereafter *GAO Report*).

Two recent studies prepared for Congress reveal just how critical nonfederal habitat is to the survival of many species. In one, the Nature Conservancy looked at all the documented occurrences of listed species and determined that approximately 50 percent were found *only* on nonfederal land.[44] The study also found that 64 percent of the known occurrences for all listed species are on nonfederal land. Most recently, the U.S. General Accounting Office found that more than 90 percent of listed species have some or all of their habitat on nonfederal lands, and 34 percent of suitable habitat for listed species is found *entirely* on nonfederal lands.[45] Removing the protection of habitat on nonfederal lands from significant degradation places these species at serious risk.

The Court of Appeals reasoned that if the government wants to protect habitat on nonfederal lands it can simply buy it. 17 F.3d 1463, at 1466. Since close to two-thirds of the land base of the United States is nonfederal, this would be a daunting undertaking, to say the least. Clearly, Congress intended acquisition to be one of the tools employed in the effort to rescue imperiled species, but it strains credulity to suggest that Congress saw massive federal acquisition as the solution to the endangered species problem.

The actual experience under the acquisition program shows that Congress had something less grandiose in mind. Between 1967 and 1993, the U.S. spent $253.900.761 to purchase 359,755 acres for endangered species protection.[46] Though substantial, these acquisitions hardly begin to address the need to maintain the habitat on nonfederal

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[44] Natural Heritage Data Center Network, *Perspectives on Species Imperilment* 5, The Nature Conservancy (1993).

[45] *GAO Report, supra* note 43, at 4-5.

[46] *Fish and Wildlife Land and Water Conservation Fund; Land Purchase Obligations FY 1967 through 1993*, Fish and Wildlife Service, U.S. Department of the Interior (1995). Document submitted under separate cover and lodged with the Clerk of this Court.

land that, according to the GAO, provides support for over 90 percent of listed species.[47] Indeed, the total acreage acquired by the federal government over the past 25 years does not even equal the habitat involved in the regional conservation plan for a single species, the California gnatcatcher.[48]

Of course, one could argue that the failure to appropriate more for acquisition simply reflects Congress' ambivalence about endangered species conservation.[49] Or perhaps Congress understood and accepted the fact that many species would probably become extinct because there was no meaningful protection for them off federal property. Rather than attribute such inconsistent purposes to Congress, however, there is another way to look at the issue; that is, that Congress in fact intended the government to use *all* of its powers in the effort to save endangered species and the ecosystems that support them. Support for that view is found in the Act itself, which defines the key term "conservation" as "the use of all methods and procedures which are necessary to bring endangered or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary."[50]

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[47] *GAO Report*, *supra* note 43, at 4.

[48] *See*, Special Rule Concerning Take of the Threatened Coastal California Gnatcatcher, 58 Fed. Reg. 65088 (Dec. 10, 1993). The conservation plan for the gnatcatcher calls for protection of 3.8 million acres of coastal scrub habitat under a voluntary public/private financing scheme.

[49] The history of the Act, however, does not support such an inference. Every time the ESA has been reauthorized, it has passed by overwhelming margins in both Houses of Congress. *See* 124 Cong. Rec. 31603 (July 19, 1978) (SENATE VOTE, 94 to 3); 124 Cong. Rec. 38159 (Oct. 14, 1978) (HOUSE VOTE, 384 to 12); 128 Cong. Rec. H3249 (June 8, 1982) (voice vote); 128 Cong. Rec. S6572 (June 9, 1982) (voice vote); 133 Cong. Rec. H11647 (Dec. 17, 1987) (399 to 16); 134 Cong. Rec. S10173 (July 28, 1988) (93 to 2).

[50] 16 U.S.C. § 1532(3). *See also Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174 (1978) ("But examination of the language,

II. THE COURT OF APPEALS DECISION MAKES NEITHER BIOLOGICAL NOR COMMON SENSE: THE COURT'S INTERPRETATION OF "HARM" IS CONTRARY TO THE PLAIN MEANING OF THE WORD, INCONSISTENT WITH THE PURPOSES OF THE ACT, ANTITHETICAL TO GOOD SCIENCE, AND BASED ON QUESTIONABLE INFERENCES DRAWN FROM FRAGMENTS OF THE ACT'S LEGISLATIVE HISTORY.

Life is full of ambiguity, nowhere more so than in the use of language. In this case, the word "harm" is the focus of attention. In its ordinary usage, the word "harm" means to "injure" or "damage" something.[51] There is no question that habitat modification harms endangered species under this commonly accepted meaning of the word. In the most literal sense, habitat degradation and fragmentation kill species.

But the Court of Appeals did not view the issue quite so literally. Rather it expressed skepticism that Congress could have intended such a broad, albeit straightforward, application of regulatory authority over private property. In other words, the Appeals Court did not believe that Congress actually meant what it said in the ESA.

The Court of Appeals found great significance in the fact that the rest of the words in the definition of "take" in Section 3 (the company that "harm" was keeping), suggested that Congress did not intend to regulate all the activities that might injure species, but only those that do so through the *direct* application of force to the *individual members* of a species. 17 F.3d 1463, at 1465; 30 F.3d 190, at 193 (*per curiam* opinion denying petition

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history, and structure of the legislation under review here indicates beyond a doubt that Congress intended endangered species to be afforded the highest of priorities.")

[51] *See Webster's Third New International Dictionary*, 1034 (1986); *The Random House Dictionary of the English Language*, 873 (2d ed. 1987).

for rehearing). Thus, even if it were absolutely clear that the complete elimination of habitat would result in the extinction of an entire species—for example, destruction of the whooping crane's wintering grounds on the Texas Gulf Coast while the birds are on their breeding grounds in Canada—that habitat destruction would not, according to the Appeals Court, be subject to regulation under Section 9. On the other hand, an activity that annoyed an individual member of a species—for example, a tour boat getting too close to a whooping crane at Aransas National Wildlife Refuge in Texas—could be subject to criminal prosecution for "harassment" under Sections 3 and 9 of the ESA. This strange irony gives new meaning to the old adage, "The law locks up both man and woman who steals the goose from the common, but lets the greater felon loose who steals the common from the goose." [52]

As scientists, *amici* do not normally engage in statutory construction. Rather, we try to understand and communicate, as best we can, the science that underlies endangered species conservation efforts. But when a legal interpretation like the one at issue before this Court has such devastating consequences for the objects of our profession, we feel compelled to speak.

We first note that the explicit purpose of the ESA is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). This focus on ecosystems is entirely appropriate because it captures the need to preserve diversity at all its levels—from genetic, to species, to landscape scale. Ecosystems, of course, are not confined by political boundaries, or ownership patterns. Species cannot read "No Trespassing" signs. Habitat straddles many a fence line. Thus, attempting to divide ecosystems, for purposes of habitat conservation measures,

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[52] John Bartlett, *Familiar Quotations*, Fifteenth and 125th Anniversary Edition, Little Brown, 918 n.13 (1980).

between federal and nonfederal land is sheer folly. Many ongoing endangered species recovery plans would be doomed to failure if this were the law.[53]

Next, we note that the Act's definition of the critical term "conservation," set forth above, is all-encompassing. "All methods" sounds definitive. Congress could have said all "appropriate" methods, or "all methods except those that involve the regulation of habitat on nonfederal lands," but it did not. It said "all methods."

Turning to the specifics of the Court of Appeals decision, the most troubling aspect, from the scientific point of view, is its insistence that there be a *direct* injury to an *individual member* of a species. 17 F.3d 1463, at 1465; 30 F.3d 190, at 193 (*per curiam* opinion denying petition for rehearing). There simply is no biological basis for such artificial requirements.

First, species (including individuals) can be just as severely injured by indirect as by direct means. Take, for example, the use of registered pesticides. Unless carefully applied and monitored, pesticides have been known to cause secondary poisoning of nontarget, endangered species, such as bald eagles. *Defenders of Wildlife v. E.P.A.*, 882 F.2d 1294 (8th Cir. 1989). Or take the case of sea turtles that depend upon unobstructed access to sandy beaches to deposit their eggs. Though the phenomenon is not entirely understood, turtles are known to have very strong homing instincts which bring them back to traditional nesting areas year after year. Should nesting

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[53] *See e.g.*, P. Logan et al., Florida Panther Habitat Preservation Plan, Florida Panther Interagency Committee, U.S. Fish & Wildlife Service, 40 (Jan. 3, 1994): "This plan identifies the minimum habitat needed to support the South Florida population. Ongoing telemetry studies may show panther range shifts caused by habitat destruction from specific development projects. Some displaced animals may succumb to intraspecific aggression or highway mortality because of adverse habitat modification in their range. In such cases the U.S. Fish and Wildlife Service may seek to invoke Section 9 of the Endangered Species Act."

beaches be obstructed by a sea wall or boardwalk, for example, the returning turtles, laden with eggs, would have no place to nest. In the case of critically endangered sea turtles, nesting beaches are precious, and each reproductive failure moves the species one step closer to extinction.[54]

There are legions of examples of harm to species from indirect means. Drawing down water levels in aquifers is a clear threat to species, such as the devil's hole pupfish, that spawn on ledges that can be reached only when the water reaches a certain height. *Caeppart v. United States,* 426 U.S. 128 (1976). Anadromous salmon can neither spawn nor migrate if streams are blocked or dried up by withdrawals. *United States v. Glenn-Colusa Irrigation District,* 788 F. Supp. 1126 (E.D. Ca. 1992); *PUD No. 1 of Jefferson Co. v. Washington Dept. of Ecology,* —— U.S. ——, 114 S. Ct. 1900, 1913 (1944) ("a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or, as here, as a fishery.") Certain freshwater mussels start out life attached to the gills of a host fish—the fish is literally the first habitat of the mussel. Actions that limit or remove the host fish also impact the mussel. This is not a hypothetical scenario; as a group, freshwater mussels are among the most endangered species in the country in part due to decline of their hosts, resulting in turn from the loss of the host species' habitat.[55]

Second, the requirement that in order to be regulated an activity must directly injure an individual member of a species, as opposed to the species itself, strikes us as missing the forest for the trees. While it is true that every individual of an endangered species is important, and in

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[54] National Research Council, *Decline of the Sea Turtles: Causes and Prevention,* National Academy Press, 77-82 (1990).

[55] R.J. Neves and J.C. Widlak, "Habitat Ecology of Juvenile Fresh Water Mussels (Bivalvia: Unionidae) in a Head Water Stream in Virginia," 5 American Malacological Bulletin 1-7 (1987).

some cases critical to its survival, it is the viability of the *species* that is of vital importance. Whether an individual northern spotted owl is actually injured when its nest trees are being clearcut is not the sole or even the most pressing concern. Rather it is the permanent loss of suitable nesting habitat and the corresponding population decline that poses the greatest threat to the long term viability of the owl.

In sum, as scientists, we are concerned that the courts understand the scientific implications of their decisions. In this case the Court of Appeals clearly did not. Indeed we are at a loss to understand how the Court could have reached a conclusion so hostile to the very premises upon which the ESA operates.

III. THE ESA SHOULD BE INTERPRETED IN THE HISTORICAL CONTEXT OF THE GOVERNMENT'S SPECIAL TRUST RESPONSIBILITY TO CONSERVE WILDLIFE FOR THE BENEFIT OF THE PUBLIC.

Since Roman law, wildlife has been regarded as *res communes*—the property of everyone.[56] At English common law, wildlife was treated as *ferae naturae*; property rights did not accrue until wildlife had been lawfully reduced to possession. *Pierson v. Post*, 3 Caines 175 (Supreme Court of New York, 1805); *Hughes v. Oklahoma*, 441 U.S. 332 (1979).

Since wildlife, in its natural state, was no one's property, it fell to government to act as trustee for the benefit of the public to which wildlife did belong.[57] From its

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[56] *See*, Michael J. Bean, *The Evolution of National Wildlife Law* (revised and expanded edition), Praeger, 10-15 (1983).

[57] *In re Steuart Transportation Co.*, 495 F. Supp. 38, 40 (E.D. Va. 1980). "Under the public trust doctrine the State of Virginia and the United States have the right and the duty to protect and preserve the public's interest in national wildlife resources."

earliest days, American law acknowledged the authority and responsibility of government to look after the public's interest in its wildlife heritage. Writing in 1914, Dean Roscoe Pound observed that, "Recently a strong tendency has arisen with regard to running water and wild game as *res pulicae*; to hold that they are owned by the state, or better, that they are assets of society that are not capable of private appropriation or ownership except under regulations that protect the general social interest." [58] The ESA is only one of the more recent, and perhaps most eloquent, expressions of this public trust. Previous statutes have dealt with migratory waterfowl, bald and golden eagles, anadromous fish, wild horses and burros, aerial hunting of wolves, and marine mammals.[59]

The point is that there is a long history of wildlife conservation in this country. Modern wildlife management has always operated on the basis that government had a legitimate and crucial role to play in conserving habitat.[60] Sometimes the exercise of this authority has interfered with private uses of the land, but the courts have consistently upheld such regulations as necessary to protect the public *res*. In *Cerritos Gun Club v. Hall*, 76 F.2d 670 (9th Cir. 1938), for example, the court sustained a wildlife regulation despite the fact that it rendered "worthless" the improvements the landowner had made to attract wildlife to his property. Even Indian Treaty Rights, regarded as akin to property rights, must yield to conservation requirements. *Puyallup Tribe v. Washington Department of Game*, 414 U.S. 44, 49 (1973). (". . . the Treaty does not give the Indians a Federal right to pursue the last living steelhead until it enters their nets.")

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[58] Roscoe Pound, "The End of the Law as Developed in Legal Rules and Doctrines," 27 Harvard L. Rev. 195 (1914).

[59] *Bean, supra* note 56, at 1-40.

[60] Aldo Leopold, *Game Management*, University of Wisconsin, 2-21 (1934).

In sum, government not only has the right but the duty to protect the habitat of endangered species on federal and nonfederal lands.[61] While landowner concerns can and should be fairly dealt with,[62] the public interest must also be taken into account through the responsible exercise of legislative authority, such as the ESA. In this way we may yet avoid the biological impoverishment that threatens our world. As Aldo Leopold, an early pioneer in the field of ecology, said in describing his "land ethic": "A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise." [63]

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[61] *See* Gary D. Meyers, "Variations on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife," 19 Envtl. L. 723 (1989).

[62] By all accounts, the ESA harm rule has not resulted in substantial violations of constitutional private property rights. No court has ruled that the ESA has taken private property in violation of the 5th Amendment. As of 1993, 12 years after the harm rule was promulgated, no cases had been filed even alleging a "taking" of real property. Congressional Research Service Report to Congress, *The Endangered Species Act and Private Property*, The Library of Congress (March 7, 1993) at 7.

[63] Aldo Leopold, *A Sand County Almanac*, Oxford University Press, 262 (1966).

CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BRUCE BABBITT, SECRETARY OF INTERIOR, *et al.*,
Petitioners,

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

AMICUS CURIAE BRIEF OF NATIONAL WILDLIFE FEDERATION, TROUT UNLIMITED, SIERRA CLUB, WESTERN ANCIENT FOREST CAMPAIGN, DEFENDERS OF WILDLIFE, THE WILDERNESS SOCIETY, ENVIRONMENTAL DEFENSE FUND, NATIONAL AUDUBON SOCIETY, PILCHUCK AUDUBON SOCIETY, PORTLAND AUDUBON SOCIETY, SEATTLE AUDUBON SOCIETY, HEADWATERS, THE MOUNTAINEERS, WASHINGTON ENVIRONMENTAL COUNCIL, AND OREGON NATURAL RESOURCES COUNCIL IN SUPPORT OF REVERSAL

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-859

BRUCE BABBITT, SECRETARY OF INTERIOR, *et al.*,
Petitioners,

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF *AMICUS CURIAE* IN SUPPORT OF REVERSAL

INTRODUCTION

This case presents a facial challenge to a longstanding regulation that defines "harm," as it is used in the Endangered Species Act (ESA or Act), to include "significant habitat modification or degradation where it actually kills or injures wildlife." 50 C.F.R. § 17.3. Although the regulation has been in existence for two decades, it has been enforced infrequently, particularly with respect to private activities on private lands. The courts steadfastly have refused to find violations of the regulation without evidence that the habitat destruction could be linked causally to actual wildlife injuries or deaths. Rather than challenge a particular application of the regulation for going beyond the permissible bounds of the statute, respondents have mounted a wholesale attack on the regulation, postulating constructions of its terms that defy the regulation's narrow language.

To strike down the regulation, the court below engaged in contorted linguistic exercises and placed undue reliance on floor statements of individual Members of Congress and congressional testimony of a proponent of a particular legislative proposal. What emerged is not the plain meaning of the statute, but the court's choice of a preferred method of protecting wildlife. This result upsets Congress's multi-faceted approach to species protection in blatant disregard of the proper role for the judiciary in construing statutes.

INTERESTS OF AMICI

The *amici* are environmental organizations involved in the development, implementation, monitoring, and enforcement of the ESA. Their extensive and far-reaching experience with the Act may assist the Court in understanding how the ESA operates in practice to protect endangered and threatened species without imposing undue burdens on private landowners.[1]

BACKGROUND

To understand how the regulation defining "harm" furthers Congress's design in the ESA, it is necessary to review the ESA's language and structure, the regulation at issue, statutory amendments to reduce the regulation's burdens on private landowners, and judicial constructions of the regulation.

A. Overview of the ESA

In 1973, Congress enacted the ESA to respond to the mounting concern that "various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. § 1531(a)(1).

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[1]The parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk pursuant to Rule 37.3 of the Rules of this Court.

In developing the ESA, Congress identified "[t]he two major causes of extinction [as] hunting and destruction of natural habitat." S. Rep. No. 307, 93d Cong., 1st Sess. 2 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2990. "Of these twin threats, Congress was informed that the greatest was destruction of natural habitats . . .." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 179 (1978).

To address these concerns, the ESA expanded significantly on earlier federal laws that focused on preserving endangered species. *See* H.R. Rep. No. 412, 93d Cong., 1st Sess. 1-5 (1973). The ESA goes further "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . .." 16 U.S.C. § 1531(b). The result, as this Court observed in *TVA v. Hill*, 437 U.S. at 180, 184, is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation," which demonstrates Congress's plain intent "to halt and reverse the trend toward species extinction, whatever the cost."

The ESA protects endangered and threatened species and their habitats in a number of ways.[2] Of particular importance here are the ESA's two prohibitions of activities that adversely affect listed species and their habitats.

First, section 7 directs each federal agency to ensure that "any action authorized, funded, or carried out by such agency [] is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary [] to be critical . . .."

---

[2]A species is endangered, when it is in danger of extinction throughout a significant portion of its range, and it is threatened, if it is likely to become endangered in the foreseeable future. 16 U.S.C. § 1532(6), (20). In making listing decisions, the Secretary must consider "the present or threatened destruction, modification, or curtailment of [the species'] habitat or range." *Id.* § 1533(a)(1)(A).

16 U.S.C. § 1536(a)(2).[3] This mandate requires federal agencies to consult with either the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service, the two expert wildlife agencies charged with administering the Act. It also imposes a substantive duty on federal agencies to ensure that their actions will neither jeopardize the continued existence of listed species nor destroy or adversely modify their designated critical habitat.

Second, section 9 makes it illegal to "take" an endangered species of fish or wildlife within the United States or its territorial seas. *Id.* § 1538(a)(1)(B).[4] By regulation, the "take" prohibition applies to threatened species as well. 50 C.F.R. §§ 17.21(c)(1); 17.31(a).[5] The "take" prohibition applies to all "persons" within the jurisdiction of the United States. Since the Act defines "person" to include governmental entities at all levels, 16 U.S.C. § 1532(13), federal agencies, private individuals, and other nonfederal entities are all covered by section 9's proscriptions.

The ESA authorizes lawsuits by the federal government and private parties to enjoin violations of the ESA and its implementing regulations. *Id.* § 1540(e) & (g)(1)(A). Citizen suits, including those seeking to restrict "takes," are limited to injunctive relief. *Id.* § 1540(g). The federal government may

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[3]Critical habitat is defined as the specific area determined by the Secretary to be essential to the conservation of the species, which may require special protection. *Id.* § 1532(5)(A). "Conservation," in turn, includes all measures necessary for recovery of the species and delisting. *Id.* § 1532(3).

[4]The "take" prohibition does not extend to plants, but rather is limited to fish and wildlife. *See Id.* § 1538(2)(B) (establishing more limited prohibitions for endangered plants). In addition, section 9 lists other prohibited acts, such as the import or export of endangered species, possession of unlawfully taken species, and violations of regulations promulgated pursuant to the ESA. *Id.* § 1538(a)(1)(A), (D) & (G).

[5]This case unsuccessfully challenged the regulation that brings threatened species within section 9. 1 F.3d 1 (D.C. Cir. 1993). That issue is not before this Court.

also bring civil and criminal penalty proceedings, but a knowing violation of the ESA is required for civil fines of $500 or more and for all criminal penalties. *Id.* § 1540(a)-(b).

B. The ESA Definition of "Take"

The ESA contains the broadest "take" prohibition of any federal wildlife statute. It defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). None of these terms is defined in the statute.

The origin of the precise language of the ESA "take" definition is somewhat of a mystery. In 1973, a subcommittee of the Senate Commerce Committee considered two bills: S. 1592 and S. 1983, 93d Cong., 1st Sess. (1973). S. 1592 would have included all the words of the present ESA take definition except the two broadest words: "harm" and "harass." S. 1983, also lacked the word "harm," but had a broader definition of "take." In addition to "hunt," "capture," and "kill," its "take" definition included three additional terms: "threaten," "harass," and "the destruction, modification, or curtailment of [a species'] habitat or range." *See* S. 1983, *supra*, at § 6(A). This last phrase would make any type of habitat modification a "take," even if it had no detrimental effect on a species.

The "take" definition reported out of the Senate Commerce Committee was an amalgamation of the two bills, containing all the words in the S. 1592 definition, plus the broader "harass" prohibition from S. 1983. *See* S. 1983, *supra*, at § 3(12). The Senate Commerce Committee report provides no clue as to why the committee rejected the narrower "take" definition in S. 1592, or why it modified the definition in S. 1983 to omit the explicit reference to habitat modification.

The Senate added the word "harm" to the "take" definition in an amendment offered on the Senate floor. 119 Cong. Rec. 25,683 (1973) (Sen. Tunney). Although called a clarify-

ing and technical amendment, its sponsor, who was also the floor manager, stressed that the amendment was "important" because it "will help to achieve the purposes of the bill and will clarify some confusion caused by language remaining in the bill from earlier drafts or omitted from earlier drafts which went unnoticed during the final committee markup." *Id.* This amendment makes it impossible to draw any inference from the prior omission of habitat modification from the "take" definition because the addition of "harm" brought back some of the breadth of that concept.

The Senate committee report addressing the ESA's full "take" definition, even before the addition of the word "harm," states:

> "Take" is defined . . . in the broadest possible manner to include every conceivable way in which a person can "take" or attempt to "take" any fish or wildlife.

S. Rep. No. 307, *supra*, at 14, *reprinted in* 1973 U.S.C.C.A.N. at 2995. The only other report language on the definition of "take" explicitly states that the word "harass" encompasses unintentional acts. It also clarifies that the word "harass" allows the Secretary "to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it more difficult for them to hatch and raise their young." H.R. Rep. No. 412, *supra*, at 11.

C. The Harm Regulation

In 1975, FWS began a rulemaking proceeding to define "take" to prohibit certain types of habitat degradation. Initially, FWS proposed a definition of the word "harass" to accomplish this goal. 40 Fed. Reg. 28,712, 28,714 (July 8, 1975). In the final rule, FWS modified its proposed definition of "harass" to cover only:

> an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering.

40 Fed. Reg. 44,412, 44,413 (Sept. 26, 1975); 50 C.F.R. § 17.3. This regulation has not been challenged in this case.

The 1975 FWS final rule also added, for the first time, a definition of "harm" to deal more fully with habitat degradation:

> "Harm" in the definition of "take" in the Act means an act or omission which actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavioral patterns, which include, but are not limited to, breeding, feeding or sheltering; significant environmental modification or degradation which has such effects is included within the meaning of "harm."

40 Fed. Reg. at 44,416. The discussion accompanying the final rule explained that "potential restrictions on environmental modifications are expressly limited to those actions causing actual death or injury to a protected species of fish or wildlife. The actual consequences of such an action upon a listed species is [sic] paramount." 40 Fed. Reg. at 44,413. According to FWS, such "environmental restrictions represent a reasonable response to the habitat needs of listed species," and they further the express ESA goal of conserving ecosystems on which listed species depend. *Id.*

From 1975 to 19 81, no federal agency initiated any actions to enforce the "harm" regulation. 46 Fed. Reg. 29, 490, 29, 491 (June 2, 1981). However, a private action invoked the regulation in a challenge to a Hawaiian wildlife agency's maintenance of feral sheep and goats for sport hunting in the habitat of the endangered Palila bird. The district court found that the

herds were feeding on and preventing regeneration of the plants needed by the Palila for survival, and that this was, in turn, leading to a population decline of the endangered Palila. *Palila v. Hawaii Dep't of Land & Natural Resources*, 471 F. Supp. 985 (D. Haw. 1979). The Ninth Circuit affirmed, concluding that allowing the sheep and goat herds in the Palila's sole remaining habitat constituted a "taking" of the Palila under the ESA, particularly in light of scientific expert opinion that elimination of the sheep and goats was necessary to allow the forest to regenerate and sustain the remaining Palilas. 639 F.2d 495, 497-98 (9th Cir. 1981).[6]

Although no one questioned the validity of the regulation in *Palila*, FWS responded by proposing to redefine "harm" to clarify that mere habitat modification without injury to wildlife is not a "take" under the ESA. 46 Fed. Reg. 29,490 (June 2, 1981). The proposed change was precipitated by a Department of Interior legal memorandum expressing the concern that the existing regulation could be construed under the *Palila* decision to prohibit habitat modifications that would not detrimentally affect listed species. Associate Solicitor Opinion (April 17, 1981), ***reprinted in*** 46 Fed. Reg. at 29,490-92.

The 1981 proposed rule would have redefined "harm" as "an act which injures or kills wildlife" and would have eliminated altogether any reference to habitat modification. *Id.* at 24,490. Many comments opposed this modification, believing that it would require a direct physical injury to an individual member of the wildlife species and would preclude finding a "take" based on habitat degradation, even where endangered species are injured or killed as a result. 46 Fed. Reg. 54,748 (Nov. 4, 1981).

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[6]This Court cited the harm regulation in *TVA v. Hill*. In observing that opening the floodgates of the Tellico Dam would destroy the snail darter's entire habitat, then Chief Justice Burger wrote: "[w]e do not understand how TVA intends to operate Tellico Dam without 'harming' the snail darter." 437 U.S. at 184 n.30.

In the 1981 final rule, FWS added the following clarifying phrase to the proposed "harm" definition:

> Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patters, including breeding, feeding or sheltering.

50 C.F.R. § 17.3. In explaining this change, FWS stressed that its proposed definition was not intended to exclude "significant habitat destruction which could be shown to injure protected wildlife through the impairment of its essential behavioral patterns." 46 Fed. Reg. at 54,748. According to FWS, "Congress made its intent to protect species and their habitat very clear. It did not, however, express any intention to protect habitat under section 9 where there was no appurtenant showing of death or injury to a protected species." *Id.* at 54,749. Moreover, FWS expressly disavowed any intent to "limit [ ] 'harm' to direct physical injury to an individual member of the wildlife species." *Id.* at 54,748. The harm regulation has not changed since 1981.

D. The 1982 ESA Amendments Allowing Incidental Takings

Although the reach of the harm regulation was discussed extensively in the 1982 ESA congressional hearings, particularly as it had been applied to private development, no amendments to section 9 or the "take" definition made it out of committee in either House. *See Endangered Species Act of 1973: Hearings Before the Subcomm. on Fisheries & Wildlife Conservation & the Environment of the House Comm. on Merchant Marine & Fisheries*, 97th Cong., 2d Sess. 290-294, 325-26, 329, 342-46, 357-60, 426-28 (1982) (*Hearings*). Instead, the 1982 amendments, like their predecessors, left the ESA's basic mandates intact, while creating more flexibility in certain applications of those provisions.[7]

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[7]This is in keeping with the pattern Congress has followed ever since it considered amending the Act in the wake of *TVA v. Hill*. *See* Pub. L.

The 1982 amendments created processes whereby both federal agencies and nonfederal entities may obtain permission to "take" a listed species in the course of an otherwise lawful activity. 16 U.S.C. §§ 1536(b)(4), 1539(a). The federal incidental take process is woven into the section 7(a)(2) consultation process. After determining that an action will not violate section 7(a)(2), FWS may permit the taking of an endangered or threatened species that is incidental to that action, subject to reasonable and prudent measures to minimize the adverse impact on the species. *Id.* § 1536(b)(4). An incidental take statement provides a safe haven, eliminating section 9 liability for "takings" that occur pursuant to it. *Id.* § 1536(o)(2).

A private applicant for a federal permit or license may also initiate a section 7 consultation, where the proposed action is likely to affect an endangered or threatened species. *Id.* § 1536(a)(3). The private actor would then be insulated from section 9 "take" liability by the incidental take statement issued through consultation. *Id.* § 1536(a)(3), (b)(4)(iv), (o)(2). In other words, the section 7 incidental take statement reaches beyond federal agencies to cover private activities that require federal permitting, licensing, or funding.

Congress did not, however, limit incidental take protection to private activities that receive federal licenses or funds:

> There are situations where the unintentional taking may occur on private lands owned by a developer who has no need of a Federal permit. These in-

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No. 95-632, §§ 3, 11(7), 92 Stat. 3751, 3753-59, 3766 (1978) (creating section 7 exemption process and requiring consideration of economic impacts in designation of critical habitat); H.R. Rep. No. 1625, 95th Cong., 2d Sess. 14 (1978), ***reprinted in*** 1978 U.S.C.C.A.N. 9453, 9464 (amendments "attempt [ ] to retain the basic integrity of the Endangered Species Act, while introducing some flexibility which will permit exemptions from the Act's stringent requirements").

> dividuals have no access to the consultation and exemption provisions of the Act since they do not apply for any Federal permit or license to conduct their activities but, nevertheless, they are subject to the taking prohibitions of Section 9.

See H.R. Rep. No. 567, 97th Cong., 2d Sess. 15, 24 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2815, 2824. Accordingly, Congress established a parallel incidental take permit process for activities with no federal nexus. *Id.*

Under ESA section 10, a nonfederal entity seeking an incidental take permit must submit a conservation plan that specifies steps the applicant will take to minimize and mitigate impacts of the action on listed species. 16 U.S.C. § 1539(a)(2)(A). The Secretary may issue an incidental take permit upon finding that the take will be incidental; the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of the taking; the conservation plan will be adequately funded; and "the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild." *Id.* § 1539(a)(2)(B). Under this last factor, a conservation plan must protect habitat when the species' survival depends on it. By writing this requirement into section 10, Congress evinced its intent that nonfederal entities obtaining incidental take permits would be required to minimize many types of adverse habitat modifications barred by the "harm" regulation. As under section 7, a section 10 incidental take permit provides a safe haven, insulating takings from section 9 liability if they are within the scope of the permit. *Id.* § 1538(a)(1).

The Joint Explanatory Statement of the Committee on Conference repeatedly refers to habitat conservation as the purpose of the section 10(a) process. H.R. Conf. Rep. No. 835, 97th Cong., 2d Sess. 29-32 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860, 2870-73. Indeed, it identifies no other purpose for section 10(a). Although one federal licensee testi-

fied in a congressional hearing about a taking that did not involve habitat destruction, those concerns did not make their way into the conference report. *See Hearings* at 358-59 (John Cagnetta, Northeast Nuclear Energy Company).[8] Instead, the conferees focused exclusively and extensively on devising a means of allowing some habitat modification "takings" to go forward without running afoul of the Act.

The conference report is very specific on this score. It states, without qualification, that the incidental take permit process was

> modeled after a habitat conservation plan that has been adopted by three Northern California cities, the County of San Mateo, and private landowners and developers to provide for the conservation of the habitat of three endangered species . . . within the San Bruno Mountain Area of San Mateo County.
>
> This provision will measurably reduce conflicts under the Act and will provide the institutional framework to permit cooperation between the public and private sectors in the interest of endangered species and habitat conservation.
>
> The terms of this provision require a unique partnership between the public and private sectors in the interest of species and habitat conservation.
>
> Because the San Bruno Mountain plan is the model for this long term permit and because the adequacy of similar conservation plans should be measured

[8]That witness discussed take liability for sturgeon eggs entrapped in a nuclear power plant water intake structure. *Id.* As a federal licensee, however, the company sought to be insulated from section 9 liability upon conclusion of a section 7 consultation. As such, this testimony had nothing to do with the section 10 incidental take permit process, contrary to the conclusion of the court below. *See* 17 F.3d at 1467-68.

> against the San Bruno plan, the committee believes that the elements of this plan should be clearly understood. Large portions of the habitat on San Bruno Mountain are privately owned. Prior to the discovery of two species of endangered butterflies, the landowner planned to develop much of its land. The butterflies face threats to their existence, however, even in the absence of any development. The primary threats to the species consist of insufficient regulation of recreational activities and encroachment on the species' habitat by brush and exotic species.

H.R. Conf. Rep. No. 835, *supra*, at 30-32; *reprinted in* 1982 U.S.C.C.A.N. at 2871-73.

The Senate report further elaborates that the San Bruno habitat conservation plan had been created to minimize the "take" of endangered butterflies that would be caused by the bulldozing of the butterflies' habitat in the course of "the development of some 3000 dwelling units." S. Rep. No. 418, 97th Cong., 2d Sess. 10 (1982). It added that incidental take permits "should lead to resolution of potential conflicts between endangered species and the actions of private developers, while at the same time encouraging these developers to become more actively involved in the conservation of these species." *Id.*[9]

E. Enforcement of the Harm Regulation

Despite the existence of the harm regulation for nearly two decades, remarkably few cases have been brought to enforce

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[9]Shortly after enactment of the 1982 amendments, the Fish and Wildlife Service issued an incidental take permit for the San Bruno habitat conservation plan, and the permit withstood challenge. The reported decisions further demonstrate that the only type of "take" precipitating the San Bruno plan was indirect injury resulting from habitat modification in the course of commercial development. ***Friends of Endangered Species, Inc. v. Jantzen***, 760 F.2d 976 (9th Cir. 1985); ***affirming***, 596 F. Supp. 518 (N.D. Cal. 1984); 589 F. Supp. 113 (N.D. Cal. 1983).

it. Criminal prosecutions for habitat destruction have been exceedingly rare. General Accounting Office, *Species Protection on Nonfederal Lands* 13 (1995). In addition, the federal government has brought very few civil actions seeking to prohibit habitat modification from going forward without developing mitigation measures through the incidental take process. *See, e.g., United States v. Glenn-Colusa Irrigation District*, 788 F. Supp. 1126 (E.D. Cal. 1992) (salmon kills from pumping water from river with inadequate fish screen). Although several citizen suits have been brought to restrict destructive habitat modifications, the total number of reported cases is less than fifteen. *See infra* at 14-15 & nn. 10-11.

Moreover, although the tenor of this case suggests that the harm regulation has impaired effective land use by private parties, the few instances of judicial intervention suggest otherwise. By far, most actions seeking to restrict habitat modification have been brought against governmental entities. The federal government has been sued most often.[10] State and local governments are next.[11] Both of the reported citizen suit en-

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[10]*TVA v. Hill*, 437 U.S. 153 (federal authority's operation of federally funded dam); *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991) (Forest Service logging program in red-cockaded woodpecker habitat); *Pyramid Lake Paiute Tribe v. Department of the Navy*, 898 F.2d 1410 (9th Cir. 1990) (Navy's outlease program authorizing water draws from Pyramid Lake); *Defenders of Wildlife v. EPA*, 882 F.2d 1294 (8th Cir. 1989) (EPA's registration of pesticide uses that caused deaths of endangered species); *Swan View Coalition, Inc. v. Turner*, 824 F. Supp. 923 (D. Mont. 1992) (Forest Service road densities affecting gray wolf and grizzly bears); *National Wildlife Fed'n v. Hodel*, No. S-85-0837, 1985 WL 186,671 (E.D. Cal. Aug. 26, 1985) (federal elk hunting season causing deaths of bald eagles who consumed lead shot).

[11]*Palila v. Hawaii Dep't of Land & Natural Resources (Palila II)*, 852 F.2d 1106 (9th Cir. 1988) (maintenance of mouflon sheep for hunting by Hawaii agency); *Palila I*, 639 F.2d 495 (maintenance of feral sheep and goat herds for hunting by Hawaii agency); *American Bald Eagle v. Bhatti*, 9 F.3d 163 (1st Cir. 1993) (Massachusetts agency's authorization of

forcement actions brought against private entities to stop habitat destruction were unsuccessful: one because a "take" could not be proven, *see Morrill v. Lujan*, 802 F. Supp. 42[4] (S.D. Ala. 1992), and the other because remedial measures had prevented the recurrence of the taking, *see National Wildlife Fed'n v. Burlington N. R.R., Inc.*, 23 F.3d 1508 (9th Cir. 1994). Moreover, no court has ever found that the harm regulation has caused a Fifth Amendment taking of private property.

The reason that so few ESA "take" enforcement actions have been successful is that the courts have insisted, as required by the harm regulation, that the challenged action actually cause injury or death to endangered or threatened species.[12] The courts have steadfastly refused to find a "take" based solely on evidence that habitat, even critical habitat, of an endangered or threatened species has been or will be destroyed. *See, e.g., Morrill v. Lujan*, 802 F. Supp. at 430 (destruction of suitable habitat does not, alone, constitute "take").

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deer hunt using lead slugs challenged for presenting risk of poisoning to bald eagles); *see also United States v. Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126 (federal challenge to regional water district's taking of endangered salmon in pumping water from river).

[12]*Compare, e.g., Defenders of Wildlife v. EPA*, 882 F.2d at 1301 (endangered species died from ingesting pesticide); *and National Wildlife Fed'n v. Hodel*, 1985 WL 186,671 (96 bald eagles died from ingesting lead shot from authorized hunt); *with American Bald Eagle v. Bhatti*, 9 F.3d at 165-66 (no evidence bald eagles consumed lead slugs from deer hunt); *and National Wildlife Fed'n v. National Park Serv.*, 669 F. Supp. at 389 (no evidence of bear mortalities from operation of campground). The courts have also required demonstration of a causal link between the challenged action and harm to imperiled wildlife. *See Pyramid Lake*, 898 F.2d at 1420 (species decline could not be linked to particular water withdrawals at issue); *Swan View Coalition*, 824 F. Supp. at 940 (plaintiffs must link species decline or other injuries to challenged road densities).

In the few habitat modification cases resulting in injunctions, drastic consequences would have followed if the challenged actions were allowed to proceed. In the two *Palila* cases, animal herds introduced and maintained by the state for hunting purposes were destroying the entire remaining habitat for the severely endangered Palila. The court concluded that allowing the herds to continue destroying the habitat would eliminate the Palila's food source and cause the extinction of the Palila. *Palila II*, 852 F.2d at 1109-10; *Palila I*, 639 F.2d at 497. Similarly, *in TVA v. Hill*, 437 U.S. at 184 n.30, opening the floodgates of the Tellico Dam would destroy the sole habitat of the snail darter. Likewise, *Sierra Club v. Yeutter*, 926 F.2d at 437-39 & n.11, 16, raised the likelihood of extinction of red-cockaded woodpecker populations, which had declined precipitously (by more than 50%) as a result of the Forest Service's logging practices, and which would face extinction without modifications to those practices.

Thus far, the courts have found workable standards in the harm regulation to determine whether an act of habitat destruction has harmed and thus taken a protected species. Nonetheless, during the course of this case, respondents have asked the courts below to issue an advisory opinion on issues that may arise in applications of the harm regulation, such as whether individual animal deaths are required to find a "take." *See* D.C. Cir. Reply Br. at 10-11.[13] Given the range of contexts in which a "take" may occur — from a knowing destruction of a nest to pesticide poisonings to destruction of the last remaining habitat for a species, resolution of these questions should be left to specific cases.

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[13]Respondents also raise the specter of an individual going to jail for normal land management activities. Of course, that has never happened under the harm regulation. Moreover, any issues that might arise if such a prosecution were brought, should be resolved in a concrete case, rather than in a facial challenge. *See United States v. Hayashi*, 22 F.3d 859 (9th Cir. 1994) (criminal "take" prosecution under Marine Mammal Protection Act, 16 U.S.C. § 1372(a)(1)-(2)(A)); *United States v. Rollins*, 706 F. Supp. 742 (D. Idaho 1989) (criminal "take" prosecution under Migratory Bird Treaty Act, 16 U.S.C. § 703).

SUMMARY OF ARGUMENT

This facial challenge to a key component of the ESA invites this Court to sit as a superlegislature and restrike the balance Congress has developed over the years in writing and amending the ESA. The plain meaning of the "take" definition supports the harm regulation, as does the structure of the Act, particularly in light of the incidental take processes added in 1982. The Court should end its inquiry here and refrain from contorting the words of the "take" definition to eliminate some broad hypothetical application of its terms. Such judicial restraint is particularly in order because Congress expressly designed the ESA "take" definition to encompass every conceivable way wildlife may be taken, and it did so, in part, by specifically adding the word "harm" to the "take" definition.

The harm regulation fits comfortably within the ESA's multifaceted approach to species protection. Nothing in the ESA or its legislative history indicates that Congress intended one ESA provision, such as its land acquisition authorization, to be the exclusive tool for addressing a particular risk to listed species. Any contrary reading rests on isolated statements of individual Members of Congress and a fundamental misunderstanding of how the ESA regulates habitat modification on public and private lands.

For twenty years, private and public landowners have adapted their behavior to conform to the harm regulation, without dire consequences. Indeed, no court has ever found a Fifth Amendment taking of private property from operation of the harm regulation. Nor has any court held an application of the harm regulation in a specific enforcement action to be *ultra vires*. In the absence of judicially determinable overreaching, it is the role of Congress and the implementing agencies, not the judiciary, to assess the effect of the regulation and to strike the balance between habitat conservation and other land uses.

ARGUMENT

I. THE ESA'S "TAKE" DEFINITION DOES NOT, ON ITS FACE, PRECLUDE THE HARM REGULATION.

The ESA defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Without a doubt, the ESA "take" prohibition is the most far-reaching such prohibition on the books, applying to more types of actions and using broader terms than any prior wildlife protection statute.

On its face, this definition ranges from broad prohibitions on harming and harassing endangered species to specific prohibitions on hunting, shooting, trapping, and capturing them. Moreover, when the prohibition on any attempt "to engage in any such conduct" is added, the ESA "take" prohibition has an extremely broad reach. It is, therefore, not surprising that Congress expressed its intent that "take" be defined "in the broadest possible manner to include *every conceivable way* in which a person can "take" or attempt to "take" any fish or wildlife." S. Rep. No. 307, *supra*, at 14, *reprinted in* 1973 U.S.C.C.A.N. at 2995 (emphasis added).

Nothing in the ESA or its legislative history defines the word "harm." The dictionary definition of the verb "harm," generally refers to causing injury, damage, or hurt. *See, e.g., The Random House Dictionary of the English Language* 873 (2d ed. 1987). Throughout this case, no one has disputed that the ordinary meaning of the word "harm" readily encompasses habitat modification that actually kills or injures wildlife. *See* 17 F.3d at 1463 (Judge Williams) ("linguistically possible to read 'harm' as referring to" habitat modification); 1 F.3d 1, 12 (Judge Sentelle, dissenting) (farmer modifying habitat "may be doing something harmful to wildlife, but he is not 'taking' it.") (emphasis added). Unless something else in the language or structure of the ESA forecloses the harm regulation, it is a fair reading of the word "harm."

The court below found such a limitation in the other words in the "take" definition by applying the *noscitur a sociis* canon of statutory construction. This Court has equated the *noscitur* canon with the principle "a word is known by the company it keeps." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). Under this canon, "words grouped in a list should be given related meaning," but only where such a reading is consistent with the law's other provisions and objectives. *Dole v. United Steelworkers of America*, 494 U.S. 26, 36 (1990) (quoting *Massachusetts v. Morash*, 490 U.S. 107, 114-15 (1989) (citation omitted)); *see also Third Nat'l Bank v. Impac Ltd.*, 432 U.S. 312, 322-24 (1977) (*noscitur a sociis* insufficient to define term without full consideration of statute's operation and history).

Noscitur a sociis can limit the meaning of an ambiguous word in a statutory list to conform it to the conspicuous common thread running through the other listed words. For example, in *Jarecki*, 367 U.S. at 307, the word "discovery" was limited to mineral discovery, rather than expanded to include inventions, because it was listed together in the statute with "exploration" and "prospecting." Similarly, in *Brown v. Gardner*, ____ U.S. ____, 115 S. Ct. 552, 555 (1994), this Court struck down a regulation limiting benefits to "injuries" resulting from third-party fault because the other terms in the statutory list — "disease" and "other physical or mental defect" — are unquestionably "free from any fault connotation."[14] In each of these cases, once this Court identified

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[14]*See also Dole v. United Steelworkers of America*, 494 U.S. at 36 (because other listed terms all require collection of information *by* the government, "reporting and recordkeeping requirement" does not include rules requiring employer disclosure to employees); *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 8 (1985) (because "fraudulent" and "deceptive" require element of nondisclosure, "manipulative' is likewise limited); *Securities Indus. Ass'n v. Board of Governors*, 468 U.S. 207, 217-18 (1984) (because all other listed terms describe underwriting activity, "public sale" excludes retail brokerage business); *National Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472, 487-88 (1979) ("business league" limited

the conspicuous common element among the listed terms, it was obvious that the challenged application of the disputed term did not fit the statutory model.[15]

In the proceedings in this case, both the court of appeals and respondents have proposed various themes as the common thread running through the "take" definition. The opinion for the court below asserts that the words in the "take" definition "contemplate the perpetrator's direct application of force to the animal" alternatively stated as fitting "the basic model 'A hit B.'" 17 F.3d at 1465. Distancing themselves from this theory, respondents variously contend that the other words in the "take" definition refer to acts: (1) "directed against protected wildlife;" (2) directly (as opposed to indirectly) causing death or injury; or (3) intentionally (as opposed to unintentionally or inadvertently) causing death or injury. Opposition to Petition for Writ of Certiorari, at i, 2, 8-9.

Noscitur cannot be invoked to limit the word "harm" to any of these meanings because not all the other words in the "take" definition are so limited. *See Brown*, 115 S. Ct. at 554; *Schreiber*, 472 U.S. at 8. The ESA's "take" definition is comprised of ten words of varying reaches. Some of the words are narrow and fit the above models. *See* 16 U.S.C. § 1532(19) ("hunt, shoot, . . ., trap, capture or collect.")

Others are not susceptible of such narrow meanings. The words "kill" and "wound" do not require that the harmful

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to organizations that provide industry-wide benefits like "chamber of commerce" and "board of trade"); *Neal v. Clark*, 95 U.S. 704, 708-09 (1877) ("debt created by fraud" limited to intentional bad faith acts where it appears in list with "embezzlement").

[15]None of these cases involved a facial challenge; instead, each arose in the contest of a disputed application of a particular statutory term, which enabled the Court to make a discrete choice between alternative meanings. Here, by contrast, respondents seek to limit the meaning of a broad statutory term without the benefit of a disputed application to illustrate its allegedly unintended breadth.

result occur intentionally or as a result of an act directed against wildlife. Thus, a train that directly hits and kills a grizzly bear "takes" the bear, even though operating the train is neither intended to kill, nor directed at, the bear. *See National Wildlife Fed'n v. Burlington N. R.R., Inc.*, 23 F.3d 1508. In addition, "kill" and "wound" do not require that an act even *directly* cause death or injury. In *Defenders of Wildlife v. EPA*, 882 F.2d at 1301, the court found that EPA violated the ESA "take" prohibition because it registered (*i.e.*, permitted) certain uses of the pesticide strychnine, and endangered animals ingested the strychnine bait and died when it was used by farmers and ranchers pursuant to the EPA registration. Similarly, in *National Wildlife Fed'n v. Hodel*, 1985 WL 186,671, the court found a "take" because FWS permitted hunting of migratory birds with lead shot, and bald eagles, who consumed the lead shot, died as a result. In these cases, the actions constituted a "take" presumably by virtue of both the harm regulation and the ESA prohibitions on killing or wounding protected species, even though the agencies did not apply force to the animals, did not act directly against wildlife, did not directly cause death or injury, and did not intentionally harm wildlife.[16]

The legislative history, regulatory definition, and plain meaning of the word "harass" also demonstrate that Congress did not intend to limit "take" to any of the models offered by respondents or the court below. First, the House report makes clear that the harassment need not be intentional. H.R. Rep.

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[16]Even under the narrower "take" prohibition in the Migratory Bird Treaty Act, 16 U.S.C. § 703, which includes the words "pursue, hunt, take, capture, [and] kill," but not "harm," some takings have been found as an unintended and indirect result of habitat modifications. *See, e.g., United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978) (discharge of toxic pesticides in waste pool killed migratory birds); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510 (E.D. Cal. 1978), *appealed & aff'd on other grounds*, 578 F.2d 259 (9th Cir. 1978) (pesticide application killed migratory birds that ingested pesticide).

No. 412, *supra*, at 11. Second, the House report stresses that "harass" includes "the activities of birdwatchers where the effect of those activities might disturb the birds and make it more difficult for them to hatch and raise their young." *Id.* Certainly, this example does not envision that the birdwatchers would apply any force, directly or indirectly, to the birds, and it turns birdwatching on its head to suggest that the birdwatchers would intend to harm the birds.

Third, although the opinion for the court below accepted that "one may under some circumstances 'harass' an animal by aiming sound or light in its direction," it struggled to make this form of harassment fit the direct application of force model by characterizing the sound waves and light particles as "physical forces launched by the perpetrator." 17 F.3d at 1465. The fit between the court's hypothetical and the direct application of force model is tenuous as best; it is nonexistent altogether with respect to respondents' intentional, directed against wildlife, and directly cause harm models.[17]

Fourth, the Secretary of Interior has defined "harass" to mean:

> an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering.

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[17] *United States v. Hayashi*, 22 F.3d 859 (9th Cir. 1994), is not to the contrary because the court construed the word "harass" in the "take" prohibition in the Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1362(12), which does not contain the word "harm," and it did so in the context of a criminal prosecution. Ironically, *Hayashi* held that an intentional act (firing shots) directed at wildlife (porpoises) to scare them away from a fishing line was not within the MMPA "take" definition. *Compare Strong v. United States* 5 F.3d 905 (5th Cir. 1993) (*per curiam*) (feeding dolphins comes within MMPA "harass" prohibition even though it does not involve the direct application of force or intentional or direct harm to dolphins).

50 C.F.R. § 17.3. This definition encompasses actions, including habitat modifications, that are likely to injure wildlife, but that neither involve the application of force nor directly or intentionally cause harm to wildlife. This regulation, which respondents have not challenged, further highlights that "harass" defies the limiting models put forward by respondents and the court below.[18]

The ESA's "take" definition, its legislative history, and judicial applications of the harm regulation point to a different common denominator among the words in the ESA "take" definition. Each word pertains to acts (or omissions) that detrimentally affect endangered or threatened species. The detrimental effect, rather than the nature of the act, is the linchpin of a section 9 take.

It would defy the sheer breadth of the "take" definition to use the *noscitur* canon to identify any narrower common denominator. First, the ESA "take" definition was intentionally broadened beyond those in prior wildlife statutes, some of which have been read to find takings through certain acts of unintentional habitat degradation. *See supra* at 21 n.16; S. Rep. No. 307, *supra*, at 14, *reprinted in* 1973 U.S.C.C.A.N. at 2995.

Second not only does the word "harm" have no counterpart in any other wildlife statute's take prohibitions, but it also was separately added to the ESA's "take" definition to clarify

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[18]Respondents' models are further undercut by the 1978 amendment deleting from the ESA civil and criminal penalty provisions the phrase "commits an act which violates." The purpose of this deletion was to clarify that ESA sanctions "apply to violations involving an omission or failure to act as well as to violations involving the commission of a prohibited act." H.R. Conf. Rep. No. 1804, 95th Cong. 2d Sess. 26 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9484, 9494. Since the direct application of force would generally not occur through a failure to act, nor would a failure to act be "directed at wildlife," these models exclude whole categories of actions clearly encompassed within the "take" prohibition.

omissions from earlier bills. 119 Cong. Rec. 25,683 (1973). The fact that "harm" was added as a separate amendment undercuts any attempt to narrow it to do no more than the other words defining "take" and thereby render it meaningless.

In this respect, applying *noscitur a sociis* would run afoul of another canon that counsels against interpreting a statute so as to render one part surplusage. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985). If "harm" is limited to direct applications of force or intentional or direct killings, it would add nothing to the words "wound," "harass," "pursue," "capture," and "kill." Where Congress has separately added a word, that word should not be made a nullity. Similarly, where Congress has expressed its intent that a provision be given the broadest possible meaning, the presumption against surplusage must win the battle between the canons of construction.

II. THE HARM REGULATION IS PERFECTLY CONSISTENT WITH THE ESA'S MULTI-FACETED APPROACH TO SPECIES PROTECTION.

The ESA embodies a multi-faceted approach to species protection. Rather than devise one regulatory tool to deal with each specific type of threat to the survival of listed species, the Act creates a full arsenal of tools to be used to stem the tide of extinction.

Thus, once a species has been listed as endangered or threatened, it and its habitat are subject to a range of protections. In addition to sections 7(a)(2) and 9, federal agencies must use their authority to conserve listed species, *id.* §§ 1531(c), 1536(a)(1); the listing agency must develop recovery plans for listed species, *id.* § 1533(f); states may establish (and obtain partial federal funding for) cooperative programs for conserving listed species, *id.* § 1535(c); and certain agencies may

acquire lands to conserve listed species, *id.* § 1534(a). The Secretary may also promulgate regulations necessary to protect imperiled species, which are enforceable under the Act. *Id.* §§ 1533(d); 1538(a)(1)(G).[19] Nothing in the Act specifies circumstances in which one of these protections must be pursued to the exclusion of the others.

More specifically, nothing in the ESA or its legislative history evinces a congressional intent to make land acquisition the *exclusive* means of protecting habitat on private lands. Although congressional committees and individual Members of Congress pointed to land acquisition as an important means of protecting habitat on private lands, none of these statements suggests that land acquisition would be a panacea for imperiled species' habitat needs on nonfederal land. To the contrary, the 1973 House report confirmed that "[c]learly it is beyond our capability to acquire all the habitat which is important to those species of plants and animals which are endangered today, without at the same time dismantling our civilization," not to mention federal budgets. H.R. Rep. No. 412, *supra*, at 6. It simply reads too much into the fragmented endorsements of land acquisition to make it the exclusive means of protecting habitat on private lands.

The contrary reading urged by respondents misreads sections 7 and 9 in two fundamental respects. First, respondents assume that section 7 reaches habitat degradation but that section 9 does not. However, even without the harm regulation, the words "harass," "kill," and "wound" reach some acts of habitat degradation that injure or kill protected wildlife. *See supra* at 20-23. The requirement that habitat degradation must lead to a detrimental effect to protected species is unique to section 9; the inclusion of some acts of habitat degradation is not.

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[19]Under this authority, the Secretary could presumably place limitations on habitat degradation that detrimentally affects protected species. Neither repondents nor the court below addressed this independent basis for restricting habitat degradation on public and private lands.

Second, it is inaccurate to pigeonhole federal actions into section 7 and private actions into section 9, as the court below and respondents try to do. Rather, section 7 consultations reach private activities on private lands when they require a federal permit or receive federal funds. Thus, private dioxin discharges into the Columbia River, which impair bald eagle reproductive capabilities, may be authorized by an incidental take statement issued under ESA section 7 for the EPA's promulgation of a dioxin standard under the federal Clean Water Act. *See* FWS Biological Opinion, No. 1-7-92-F-619 (Jan. 6, 1994).

Conversely, section 9 prohibits harmful activities undertaken by federal agencies that fall through the cracks in section 7. For example, federal actions that kill endangered species would violate section 9, but may pass muster under section 7 if the existence of the species would not be jeopardized. In addition, even without the harm regulation, section 9 reaches federal habitat degradation on lands that have not been designated as critical habitat. *See Defenders of Wildlife v. EPA*, 882 F.2d 1294; *National Wildlife Fed'n v. Hodel*, 1985 WL 186,671. Because no critical habitat has been designated for most listed species, section 9 plays a critical role in preventing federal habitat destruction. *See* General Accounting Office, *supra*, at 1 (781 listed species); 50 C.F.R. § 17.11 (only 83 listed species have critical habitat designations).

Accordingly, sections 7 and 9 cannot be neatly divided into federal and private spheres. Both sections apply to federal agencies, and both prohibit habitat destruction on private lands in some circumstances. The overlapping roles of sections 7 and 9 undermine the theory that Congress intended land acquisition to be the sole mechanism for dealing with habitat on private lands.

III. THE ESA STRIKES A WORKABLE BALANCE BETWEEN HABITAT CONSERVATION AND OTHER LAND USES.

Recognizing that few species need totally undisturbed use of habitat, Congress rightfully assumed that civilization and species protection could coexist. Development and resource extraction activities may need to be modified to facilitate such coexistence. However, because species rarely need totally undisturbed habitat, such modifications are generally quite modest, entailing, for example, a slight relocation of a planned road or sewer pipe, and enabling private and governmental land uses to proceed apace.

Where modifications do not eliminate incidental takings, the ESA, by virtue of its 1982 amendments, allows such takings to occur when measures are taken to minimize the damage. The harm regulation, therefore, does not operate to foreclose private or public land uses. Instead, it fosters compliance with a regulatory process designed to minimize and mitigate the impacts of those activities on endangered and threatened species. What this case seeks is the wholesale elimination of this review and mitigation process, despite the widespread acceptance it has gained over the years. Without such review, a proposed project's destructive impacts on listed species will be unaddressed until after the damage has been done, even when the damage easily could have been avoided.

When coupled with the incidental take permit process, the harm regulation has fostered cooperative strategies between developers, regulators, and environmentalists to conserve species and their habitat. T. Beatley, *Habitat Conservation Planning: Endangered Species & Urban Growth* 24-25 (1994). Habitat conservation plans are developed locally or regionally by those who will live with them. For example, in Kern County, California, state and federal agencies, land developers, oil and gas companies, agricultural interests, and private conservation groups are finalizing a habitat conservation plan to protect the San Joaquin kit fox and other endangered and threat-

ened species. *Id.* at 168-69. The planning process is flexible, leading to the development of plans (often through creative compromises) that are carefully tailored to human needs, species' needs, and the lay of the land. *Id.* at 36.

The purpose of a habitat conservation plan, whether it covers 5 acres or 400 square miles, is to allow private and public land use activities to go forward in a manner that minimizes their harmful effects on endangered and threatened species. Many conservation plan restrictions on private land use operate in much the same way as zoning laws, by designating locations for particular types of development, establishing buffer zones around breeding animals, and specifying maximum building densities. *Id.* at 35. Other provisions are analogous to common land use regulations that require restoration after development or restrict pesticide use in sensitive areas, such as endangered butterfly habitat. *Id.* at 37, 59, 66-67 (San Bruno plan; Marina Dunes draft plan). Many plans charge development impact fees, with the proceeds used to protect habitat for imperiled species. *Id.* at 39, 81 (San Bruno plan imposes annual fees of $20 per residential dwelling unit and $10 per 1000 square feet of commercial office space; in Coachella Valley plan, initially $600 then $100 fee charged per acre developed in historic range of fringe-toed lizard). When a habitat conservation plan sets aside land for undisturbed habitat for a listed species, the land is often purchased, rather than regulated to prohibit conflicting private land uses, and significant federal funding has sometimes been provided. *Id.* at 34-35, 80, 180 (10% of remaining Coachella Valley fringe-toed lizard habitat acquired as preserves through federal land exchange and development impact fees; extensive federal appropriation for land purchases for Balcones Canyonlands National Wildlife Refuge).

The harm regulation has helped forge these positive strategies to protect endangered and threatened species, without wreaking havoc. The net result has been improved survival of imperiled species — the over-arching goal of the ESA. Although the harm regulation's detractors postulate a

parade of horrible consequences flowing from the regulation, in practice, few have materialized, as evidenced by the dearth of Fifth Amendment takings cases.

Striking down the harm regulation would throw habitat conservation planning into disarray, just when it is beginning to make significant progress. Throughout the country, private developers, federal and state regulators, local governments, environmental organizations, and others are working together to write habitat conservation plans that allow development to go forward profitably while protecting endangered and threatened species. More than 30 habitat conservation plans have been approved thus far and more than 100 are currently being developed. General Accounting Office, *supra*, at 9. Congress endorsed these efforts by giving the ESA a broad reach and by establishing the incidental take permit process.

It is the role of Congress, not the Courts, to evaluate this system of which the harm regulation is an integral part. The task is a weighty and quintessentially legislative one. Many species depend principally on nonfederal land. *See id.* at 5 (Table 1) (247 listed animal species have over 60% of their total habitat on nonfederal lands). The federal government may be incapable of preserving sufficient habitat for these species through federal activities and land acquisition alone. Therefore, limiting habitat conservation to these devices may result in extinction for many species. Twenty years ago, Congress set out to stem the tide of extinction. It is for Congress to decide whether to shift course.

CONCLUSION

For the reasons set forth above, the decision below should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.,

Petitioners,

—v.—

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE FOR FRIENDS OF ANIMALS, INC., IN SUPPORT OF PETITIONERS

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Questions Presented

1. Whether, under the Endangered Species Act, which makes it unlawful to "take" any endangered or threatened species, and which further defines "take" to include "harm," the Regulation of the Secretary of Interior, defining "harm" as embracing habitat modification that either injures or kills wildlife is both valid and reasonable?

2. Whether the Secretary's Regulation, defining "harm" is mandated in order to reverse the trend of habitat modification (Destruction), imperiling many endangered species throughout the United States?

3. Whether the Court, if it sustains the validity of the Secretary's Regulation, defining "harm" should address, *sua sponte*, or require the parties to brief, the question, who ought to assume the costs of carrying out the Regulation?

4. Whether the resulting cost of halting habitat modification and restoring listed species must, in the final analysis, be shared?

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BRIEF AMICUS CURIAE, FOR FRIENDS OF ANIMALS, INC.

Statement

Friends of Animals, Inc., presents this brief, as Amicus Curiae, in support of the Secretary of Interior ("Secretary"), who argues that the Court should uphold the Regulation [50 C.F.R. 17.3], defining "harm," as used in Section 9 of the Endangered Species Act [16 U.S.C. Sec. 1538 (a) (1)], making it unlawful to "take" an endangered or threatened species. "Take," as used in the statute, includes "harm" in its definition.

The Regulation in question here defines "harm" as action that either kills or injures wildlife. Killing or injuring wildlife, the Regulation further provides, can result from habitat modification that includes significant impairing of behavioral patterns, breeding, feeding, or sheltering of wildlife.

At bar, the Secretary in enacting the Regulation, found that modification of critical habitat, "harming" endangered species, must be prevented to preserve wildlife and wildlife habitat.

Interest of Amicus

Friends of Animals, Inc., founded in 1957, is a not-for-profit animal protection group, representing in excess of 100,000 corporate members nationally and throughout the world.

Amicus has devoted a substantial portion of its activities to aiding endangered and threatened species on a global basis. Some of these activities are set forth below.

Amicus has donated private funds of its contributors to projects, seeking to preserve endangered species habitats.

Amicus has also received grants in aid from the federal Department of Interior for use in the protection of the elephant in habitat countries, covered by the African Elephant Conservation Act. Amicus became eligible for such grants in aid, after being approved as a qualified partner to administer both military surplus equipment and government grant funds for endangered species projects abroad. Amicus was thus "certified" as a participating "Private Voluntary Organization" by the United States Agency for International Development.

Amicus joined with the United States Department of Interior to adequately equip forest rangers in African countries with the resources necessary to protect listed species, e.g.,

endangered elephants (Denominated by the Department of Interior as endangered or threatened, see 50 C.F.R. 424).

Amicus has also participated heavily in the Department of Interior efforts to restore the wolf to the states of Idaho, Montana and Wyoming. This project will yield significant revenues from tourists, spurred by the opportunity to observe the wolf—this will largely offset certain expenses of the project itself.

Amicus's contributions consisted of hiring a wolf scientist to study for two years the wolf and its prey species. Also, Amicus financed certain public opinion polls, investigating the public receptiveness to the wolf restoration program in states in which the wolf's return was targeted. Amicus's efforts, in part, led Congress to appropriate funds for this purpose.

Summary of Argument

1. The declining wildlife habitat is causing an indisputable reduction in the population of endangered and threatened species, which, additionally, risk extinction because of lack of adequate feeding, breeding and shelter areas. The disappearance of species habitat is clearly traceable to the consistent and unwavering pattern of land and coastline commercial utilization in order to cope with the ever present pressures of economic development.

2. Solutions must be created to achieve the correct and proper balance between the legitimate, compelling need to restore and protect wildlife and a suitable environment, and the conflicting interest, which has long recognized a property owner's to utilize property consistent with the owner's reasonable investment expectations.

3. While the Secretary's Regulation, extending "harm" to cover habitat modification that kills or injures wildlife is eminently reasonable and necessary to reverse the trend of the progressive deterioration of species habitat, an equally com-

pelling and important issue, not be avoided here is the question, who must bear the cost of insuring and preserving this habitat. Shared responsibility for assuming these costs is the apparent answer.

4. The adverse effects of economic development of property upon species and their habitat is evident from even a bare microscopic view of specific instances in this country, including the Florida-Caribbean region; states in the south; southern border states; the Great Lakes and Pacific northwest sectors; and California and far-southwestern states. Declining habitat from development in these areas have led to diminished populations of the manatee in Florida; bat species in Kentucky and neighboring states; the black bear in Louisiana; the piping plover in the Great Lakes and Pacific northwest; and the desert tortoise in California and Nevada.

5. Destruction of island and narrow coastline habitats—"insular habitats"—have also impaired species, mainly birds, by reason of these species' inability to adapt to other habitat environments.

6. There is also an apparent decline in the population of migratory birds, on account of the deforestation of their southern habitat, the southern tropics, as well as the forest fragmentation in their spring and summer habitat, the northeast. Paralleling this are the vanishing coastlines, for example in Connecticut. Again, all of this has been brought about by the pressures of economic development.

7. Amidst the great clamoring of how to allocate the cost of wildlife and environment restoration and recovery, the choices here are limited. But it is not wise, in the view of Amicus, to impose on one party or group to the controversy the sole financial responsibility for the realization of a laudable goal, that, ultimately, will benefit all. In another context, apportioning the cost for the attainment and perfection of nuclear energy, the Supreme Court endorsed the principal that it (The cost) ought to be shared by all.

Argument

It is no longer in dispute that habitat modification (Destruction) has played a major, if not dominant, role both in the reduction and extinction of wildlife throughout the world. We speak here of the real, as opposed of the speculative, impact of this phenomenon [*American Bald Eagle* v. *Bahtti*, 9 F.3d 163 (1st Cir. 1993)].

Amicus strongly believes that, regardless of the outcome of this case, the magnitude of the decision cannot be overstated. It will, indeed, have incredibly far reaching effects.

Indisputably, habitat modification, as a factor jeopardizing wildlife, has resulted, to a significant degree, from the unwavering trend in America that places primary emphasis upon the optimal development of private property. Amicus harbors grave and deep concerns about the ever mounting tension between: (1) legitimate, urgent and compelling need to deploy specific steps and procedures that will adequately insure the protection of wildlife and wildlife habitat, which, in turn will promote the upkeep and preservation of the environment, and (2) the strong tradition in this country, recognizing the property owner's right to deploy and develop property consistent with the owner's reasonable investment expectations. Amicus views this and other proceedings (Judicial, legislative and administrative) as a device that will hopefully permit a productive search for solutions that, in the end, will assure an accommodation of both of these concerns.

The conflict between concerns for wildlife and the environment and the pressures to achieve the optimal level of property is not new. At bar, perhaps, the conflict has been brought to a head. Amicus believes, however, that this case offers a proper vehicle for the Court to go beyond the mere question of the validity of the Secretary's Regulation at issue here. Amicus, perhaps in a departure from orthodox advocacy, believes that the validity of the Regulation cannot and should not be divorced from the question, who ought to be responsible for bearing the costs of carrying out the Regulation,

assuming that the Court decides that the Secretary was empowered to enact it. In the paragraphs set forth below, we attempt a discussion of these points.

As the Court has recognized, habitat modification constitutes perhaps the greatest threat and obstacle to the enhancement of wildlife. [*TVA* v. *Hill*, 437 U.S. 153, 179 (1978)]; *see also Sierra Club* v. *Yeutter*, 926 F.2d 429 (4th Cir. 1991); *Palila* v. *Hawaii Dept. of Land and Natural Resources*, 852 F.2d 1106 (9th Cir. 1988), and 639 F.2d 495 (1981); *United States* v. *Glenn-Colusa Irrigation District*, 788 F. Supp. 1126 (E.D. Cal. 1992).

We here offer some of our observations, based upon past study, research and consultation, why the Secretary's Regulation should be upheld as an effective means to check the unrestrained modifications of wildlife habitat. While there exists wide familiarity with the impact of habitat modification upon the spotted owl (Well documented by the news media); the red cockaded woodpecker [*Sierra Club* v. *Yeutter*, *supra*]; and the snail darter [*TVA* v. *Hill*, *supra*; *United States* v. *Glenn-Colusa*, *supra*], numerous other wildlife, whose list is much too long to properly analyze here, are similarly imperiled.

First, wildlife experts divide species into two categories, "generalists" and "specialists." The former clearly possess the necessary flexibility to adapt to different living conditions, while the latter do not and are thus restricted to more confined habitat parameters, a circumstance brought about by the difficulty in locating food in a new habitat locale. Most endangered and threatened species fall into the "specialist" category, which poses the ominous risk of severe diminution of these particular species.

A. In the southeast section of the United States, particularly Florida and the Caribbean waters, several species are imperiled, including the Everglades fox squirrel, the Key Largo woodrat, the loggerhead turtle (Whose nesting beaches have been eroded by coastal development) and the manatee, a

whale like mammal, which is a sub-group of the West Indian species, valuable for eating vegetation that clog waterways.

The status of the manatee led to the creation of the "Save the Manatee Club," founded by the former Florida Governor, Bob Graham. At home in shallow water, the manatee's habitat has been disturbed by wetland fill and dredge, by-products of development activities, which, together with excessive watercraft activities have deprived the manatee of needed feeding areas.

B. In the southern border states, various species of the bat, the Indiana and grey bats, have diminished from intrusions with their hibernating habitat, caves, where the species spend from four to eight months, beginning in the fall. Normally, they sleep during the entire hibernating period and store enough fat to last until spring. Yet, if awakened by cave explorers, usually charged admission by commercial interests, the animal's metabolism will accelerate, prematurely using the reservoir of stored fats, which can often lead to starvation prior to the end of the hibernating period.

Another species in the south, the Louisiana black bear, found in Louisiana and Texas, has decreased in population by eighty per cent during this century, on account of excessive deforestation and the export agricultural development.

C. In the north and northwest sectors of the United States, diminished habitats have adversely affected the stellar sea lion (Alaska) and the Columbian white-tailed deer (Washington and Oregon). A vivid prototypical example of the "specialist" species, is the piping plover, found in the Great Lakes and northwest regions. Its very specific habitat requirements, gravelly shoreline and wetland locations, have deteriorated, again, from the pressures of land development and watercraft activity.

D. Too, other birds, harmed by habitat incursions, include the bald eagle, the ivory billed woodpecker, the sandhill crane and the Bahamian parrot, the latter being one of many birds, occupying island type or narrow, enclosed coastline areas.

The continued preservation of these "insular habitats" is essential for the well being of the particular species, who have no place to go, unable to handle other habitats.

The steady depletion of the New England coastline is also of great concern to wildlife protectors. In Connecticut, thirty percent of the state's wetland tidal areas have been lost to development. Observers have also noted that migratory birds, which leave the northeast for the south in winter, have dwindled because of deforestation in the southern tropics and fragmentation of northeastern forests—for development purposes.

E. In the south and far western United States, habitat modification has led to population declines of the San Joaquin kit fox and the desert tortoise. Indeed, the tortoise has undergone a ninety per cent loss of population, as a result of continuous development and highway construction.

The foregoing discussion presents a mere microscopic view of the ongoing endangered habitat deterioration on a national (and global) level. In truth, it is probable that entire ecosystems are presently greatly at risk, see New York *Times*, February 14, 1995, "Latest Endangered Species: Natural Habitats," P. A-1, Cols. 5-6.

Yet, the harder question is who must pay the cost of wildlife and environment restoration, now a very heated topic, both in the courts [*Lucas* v. *South Carolina Coastal Council*, 112 S Ct. 2808 (1992); *Dolan* v. *City of Tigard*, 129 L Ed. 2d 304 (1994); *Seattle* v. *Audobon Soc'y.*, 92 Civ. 479 WD (W. D. Wash)], and in Congress [E.g., House Bill H.R. # 9]. No doubt, the cost of recovering a single endangered species is exhorbitant by any standard. Realizing this, property owners are clamoring for payment, compensation for intrusions with the commercial exploitation and utilization of their properties. And, there is presently pending in Congress a multitude of proposals, requiring that any regulation, restricting the use of private property withstand a "cost-benefit" analysis, prior to its implementation, House Bill, H.R. # 9, supra.

Undeniably, a decision, upholding the regulation at issue here, cannot be divorced from the gnawing concern, who must pay for the regulation's enforcement. So far as the judiciary is concerned, limited alternatives are available.

Amicus believes that it is not, however, a question of either placing the onus entirely on the property owner, in the form of property use restrictions, which would surely be deplored by property rights advocates; or, simply rewarding the property owner by compensating him for a "taking" resulting from the restrictions necessary to achieve the goal of halting habitat modification, *Lucas* v. *South Carolina Coastal Council*, *supra* (Realistically, however, a "taking" here would be difficult to establish, since it appears that Respondents' property has not been the subject of a total regulatory taking, depriving Respondents of the complete economically viable use of their land).

Neither alternative affords an adequate long term solution. In the final analysis, it is not a question of "either . . . or." Rather, property advocates and wildlife proponents must pursue joint and meaningful solutions. For, the use, efficient utilization and ultimate enjoyment of property cannot be achieved without concerns for wildlife and its environmental components. Otherwise, what today is simply urban blight will surely turn into urban rubble in the future.

Sharing the cost and upkeep of the environment is an idea suggested by this Court in another context, *see Duke* v. *Env. Carolina Env. Study Group*, 438 U.S. 59 (1978) (Requiring private citizens to accept limited, capped damage awards for injuries, stemming from nuclear accidents). In this context, the goal of attaining and perfecting nuclear energy ought to be viewed from the same standpoint as the objective of wildlife and wildlife habitat preservation. In the case of either goal, there must be shared responsibility; otherwise, the unending battles among rival interests will lead to the goal not being attained at all. *Compare*, *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104 (1978).

Conclusion

The judgment below should be reversed and remanded.

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OCTOBER TERM, 1994

BRUCE BABBITT, Secretary of the United States Department of the Interior, *et al.*,

Petitioners,

vs.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AS *AMICUS CURIAE* OF THE ENVIRONMENTAL LAW COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

The Environmental Law Committee (the "Committee") of The Association of the Bar of the City of New York (the "Association") files this brief as *amicus curiae* with the approval of the Association and the consent of all parties, urging that the judgment below of the United States Court of Appeals for the District of Columbia Circuit be reversed.

The Committee is one of the standing committees of the Association, a voluntary bar association with more than 20,000 members. The Committee was founded due to the growing importance of environmental law to the City and to the Nation. The Committee, comprised of lawyers representing in their personal practices diverse private, governmental, academic and not-for-profit clients, endeavors to reflect considered, non-partisan views on matters of public policy. Since its inception, the Committee has actively participated in the consideration, development and interpretation of much of the proposed legislation and regulation in the environmental field.

The decision below, addressing application of the Endangered Species Act to protect the critical habitat of endangered or threatened animals, and this Court's review of that decision, are of exceptional social and legal importance. This Court's final determination with respect to the statutory provisions at issue will have a major impact on whether or not significant portions of genetic material currently in existence will survive. The ecological reality that habitat destruction has been the functional equivalent of direct extermination is especially evident in urban areas familiar to the Committee, such as the City of New York, where species have been eliminated from formerly ecologically rich areas solely by indirect means. The Committee emphasizes that the preservation of endangered species is an issue of great ecological, medical and economic importance to all Americans. Accordingly, we intend this *amicus curiae* brief to facilitate full development of the issues involved for the Court's review.

SUMMARY OF ARGUMENT

I. The decision below found that the Endangered Species Act (ESA) did not permit imposition of requirements for the protection of endangered species habitat on privately owned lands. The decision was purportedly based on the statutory language which, the court below found, permitted restrictions only on the direct application of force against a member of an endangered species. However, neither the particular term of art created to identify the proscribed activity, "take," its ten definitional descriptors, nor the legislative history of the ESA support imposition of such a direct force requirement in the administration of the ESA.

II. The ruling below would require that publicly-owned lands be required to shoulder the entire burden of endangered species habitat protection. This is inconsistent with Congressional intent and would likely impose stringent new restrictions on recreational and commercial use of public lands. Since loss of habitat due to human intervention is the principal cause of species extinctions, under the ruling below the fate of many endangered and threatened species would depend on the entirely fortuitous circumstance of whether their remaining range was on private or public lands.

III. The decision below is inconsistent with the two-step approach to statutory construction developed in *Chevron*. It also fails to acknowledge Congressional recognition and evident approval of including habitat protection on private lands within the administration of the ESA at the time amendments were made to the statute in 1982.

ARGUMENT

I. THE STATUTORY DEFINITION OF "TAKE" DOES NOT IMPLY A REQUIREMENT OF DIRECT APPLICATION OF FORCE AGAINST AN ENDANGERED SPECIES

The court below concluded that with respect to privately owned lands, the Endangered Species Act (ESA) authorizes regulation only of direct applications of force against

endangered or threatened species. The majority applied the doctrine of *noscitur a sociis* to conclude that the statutory definition of the proscribed activity "take" does not permit restrictions on habitat modifications for purposes of endangered species preservation.

Respondents confine their challenge to a claim of overbreadth in the Fish and Wildlife Service (FWS) definition of "harm" appearing at 50 CFR § 17.3. Yet of the ten descriptors of "take" set forth by Congress in 16 USC § 1532 (19) ("harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect"), at least four have normal, everyday meanings that cannot be fairly presumed to require direct force. The terms "harass," "harm," "pursue," and "kill" are all equally receptive to either direct or indirect means of commission.[1]

Analogies to assault statutes and similar legislation and even common law principles of nuisance aimed at protecting a far from endangered species, homo sapiens, are also helpful. Indeed, such analogies were examined by the court below, albeit with inconclusive results. 17 F.3d at 1464-65. There can be little doubt that when applied to conduct among humans, such terms

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[1] Respondents' legal arguments focus exclusively on the "harm" descriptor and ignore clear legislative history supporting a Congressional intent to include habitat modifications within the activities proscribed by the "take" descriptor "harass." The House Report on the ESA states:

> ['Take'] includes harassment, whether intentional or not. This would allow for example, the Secretary to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young.

H.R.Rep. No. 412, 93d Cong. 1st Sess. 11 (1973). Similarly, one can harm an animal by eliminating its food supply, kill it by poisoning its water supply, or pursue it by increased human traffic near its foraging area.

If temporary intrusions such as birdwatching which can be shown to be causally linked to interruption of breeding patterns were intended to qualify as "takes," then the timbercutting at issue here was intended by Congress to be proscribed as well.

as harass, harm, pursue or kill would interdict actions adversely affecting habitat or personal environment such as destruction of housing, withholding of food, forced relocations, arson, release of hazardous substances, or creating excessive noise. Indeed, extensive regulation of activities affecting interactions among humans have been found statutorily authorized by legislation which might initially be understood to address only direct bodily harm.

The FWS has not, however, given such broad meanings to these terms in its ESA "take" regulations. Rather, the FWS rules require as an essential element of its "harm" definition that there be an evident chain of causation leading from prohibited conduct to "actual [] kills or injur[ies to] wildlife," 50 CFR § 17.3. *See Palila v. Hawaii Dep't of Land & Natural Resources*, 852 F.2d 1106, 1108-10 (9th Cir. 1988); *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991). Laws regulating human behavior have not been interpreted as narrowly.

Thus the FWS regulations implementing sections 3 (19) and 9 (a) (1) of the ESA do not go beyond the ordinary meaning of the terms utilized in the legislation. The terms employed cannot be fairly read to require direct application of force. Indeed, the FWS has interpreted the statute more narrowly than necessary by conservatively incorporating two requirements which limit potential overbreadth in the application of the "take" concept to habitat modifications: (1) a requirement of actual death or injury to a member of an endangered species, and (2) a demonstrable causal relationship between that death or injury and the activity subject to restraint.

When the court of appeals majority ruled that the statutory term "take" could not embrace habitat modification, it applied to the organisms protected by the ESA standards which are different from those which would normally be applied to statutes controlling human conduct. By focusing only on the *actor* and not the *victim*, the court incorrectly limited the scope of the statute from that intended by Congress. In doing so the court seems to be presuming that only the human conduct, not the plant or animal impact, was of importance.

The ESA is not so limited. Indeed, such an orientation is particularly inappropriate given the objectives of the legislation and the interests it seeks to protect. The ESA states that among its purposes is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . . " ESA § 2 (b), 16 USC § 1531 (b). Indeed, the legislative history of the ESA reveals that the intent of Congress was to define takes "in the broadest possible manner to include any conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." S.Rep. No. 307, 93d Cong., 1st Sess. 7 (1973).

There is therefore no suggestion in either the text of the ESA or its legislative history that Congress intended takings to be narrowly construed or ecosystem protection confined to the public sector, as respondent contends. Since the implementing regulations adopted by the FWS are quite comfortably within the sphere of the statutory terms selected by Congress, contain death/injury and causation requirements limiting potential for overbreadth, and achieve the expressly stated purpose of the ESA to protect endangered species and conserve the ecosystems upon which their survival depend, they should be sustained.

II. THE COURT OF APPEALS RULING WOULD EFFECTIVELY PLACE STRINGENT NEW LIMITS ON THE USE OF PUBLIC LANDS WHICH ARE CONTRARY TO CONGRESSIONAL INTENT

The ESA as it has been applied since its inception places significant burdens on federal agencies to formulate and implement programs for the preservation and conservation of endangered and threatened species. As all parties to this case have correctly noted, § 7 of the ESA, 16 USC § 1536, imposes comprehensive scoping, documentation and planning responsibilities on federal agencies that are not imposed on the private sector under § 9. Section 7 protection plans take into account the limitations on destruction of habitat imposed by private parties under the settled interpretation of § 9 prior to this case. Comprehensive planning activities are thus keyed to an

affected species, not a parcel of land; they are essentially coextensive with the range of each particular species. The level or degree of effort devoted to ESA protective activities in a national park, for example, is not currently determined in isolation, but on an integrated basis with the level of habitat protection to occur on adjacent private lands. This division of responsibilities is consistent with traditional expectations: the private party is prevented from doing harm; the public party is charged with providing a benefit.

However, if habitat preservation responsibilities are henceforth to fall exclusively upon federal agencies and cooperative state projects receiving federal funding, then new and potentially vast habitat protection responsibilities will be imposed upon the public sector. These duties are far beyond those governments have been called upon to bear under the more balanced and geographically neutral interpretation of habitat protection responsibilities that the ESA has received during its first 20 years. Thus logging, grazing and mining activities on public lands heretofore permitted under comprehensive protection plans embracing both private and public habitat may now become inadequate to accomplish the species protection objectives of the ESA. Indeed, this very claim has already been asserted in *Seattle Audubon Soc'y v. Espy*, Civ. No. 92-479WD (W.D. Wash.). This massive shift of endangered species protection responsibilities onto public agencies, promising potentially dramatic new restrictions on the use of public lands, is a necessary implication of the construction given the ESA by the decision below that cannot easily be squared with Congressional intent.

The confinement of restrictions on habitat destruction under the ESA to public lands would also produce erratic, random and entirely fortuitous results in efforts to protect specific species as well. It is widely recognized and accepted that the currently existing geographic range of many endangered species has diminished substantially as a result of human intervention. In some instances the rate of shrinkage is accelerating, see, *e.g.*, the Draft National Biological Survey, discussed in The New York Times, February 14, 1995, at 1 col. 5. The current range

of some endangered species is so reduced that it can be expressed in acres. *Ibid.* However, under the decision below, survival of many endangered species, and success in meeting the ESA goal of preserving them, would depend upon the pure happenstance of whether the current existing range of a particular species happened to be located on public or private property. Protection of breeding, feeding and sheltering activities could only be required on the former while private parties would be free to burden the species and thwart public efforts. It is difficult to ascribe to Congress such a patchwork program of protection, in which the very fate of many species will be preordained largely by geography and land ownership patterns.

III. AN EVALUATION OF THE CHALLENGED REGULATIONS UNDER *CHEVRON*, BUTTRESSED BY THE 1982 LEGISLATIVE AMENDMENTS, SUPPORTS THE ADMINISTRATIVE INTERPRETATION OF THE ACT AS AUTHORIZING RESTRICTIONS ON DESTRUCTION OF HABITAT

Under the standard approach to statutory interpretation set forth in *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the question for the Court in the presence of Congressional silence or ambiguity with respect to the specific issue "is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843 (footnote omitted). In such an instance the agency's regulatory choices "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Ibid.*

In this case, the decision below demurs on whether its interpretation rests on the first step of *Chevron*, the presence of Congressional silence or ambiguity, or the second step, *viz.* arbitrary, capricious, or manifestly contrary to the statutory language. The opinion instead concluded that "the exact point where an agency interpretation falls down may be unclear." 30 F.3d at 193.

As set forth above, no fewer than four of the statute's ten descriptors of the proscribed activity "take" accommodate by their natural meaning either a direct or indirect means of accomplishment. In addition, the legislative history at the time of enactment makes clear that the "take" concept should be construed "in the broadest possible manner." S.Rep. No. 307, 93d Cong., 1st Sess. 7 (1973). Moreover, in implementing its regulatory program the FWS has conservatively required demonstration of a causal linkage between, in this instance, an objectionable habitat modification and actual death or injury to wildlife. Thus the "clear determination by Congress" that § 9 of the Act "should not reach habitat modifications," 30 F.3d at 193, is not evident at all.

Moreover, it is all the more difficult to ascribe such a conscious intent to Congress when an interpretation of "takes" that failed to include restrictions on habitat destruction would deprive the ESA of its essential purpose of arresting extinctions and assuring the survival of endangered species. The logic of the court below presumes that in both 1973 and 1982 the Congress was either ignorant of the critical role of habitat preservation in accomplishing the purposes of the ESA or intentionally enacted and subsequently amended a statute which would be ineffectual and contained the seeds of its own lack of success.

What is indisputable is that in 1982 Congress revisited the ESA, and specifically addressed the function of a "take" in § 9 implementation. In amendments to the ESA enacted in 1982, Congress implemented a permitting program authorizing "takes" that would otherwise be prohibited if they were "incidental" and satisfied other environmental requirements. *See* ESA § 10(a)(1)(b), 16 USC § 1539(a)(1)(b). These amendments specifically contemplated the possibility of a "take" by habitat modification, and were aimed at allowing some limited habitat alteration. H.R. Rep. No. 835, 97th Cong., 2d Sess. 30-32 (1982); S. Rep. No. 418, 97th Cong, 2d Sess. 10 (1982).

The court below disregarded the significance of the 1982 amendments on the basis that "where Congress adopts

amendments on the basis of a misconception as to the meaning of a prior statute's related provisions, the latter act does not turn the misconception into law." 17 F.3d at 1469. This logic is obviously dependent upon whether the court was correct in its belief that in 1982 there was in fact a Congressional misconception about what "take" and its ten descriptors meant—a belief for which the court had no support. The more likely inference is that by squarely addressing the FWS application of a "take" in specific factual contexts over almost a decade preceding the 1982 amendments, and then proceeding to add an ameliorative feature—the concept of an "incidental take"—Congress necessarily expressed basic satisfaction with the past implementation of the ESA in this area. It is of particular significance that the 1982 amendments were specifically directed at the application by FWS of the "take" principle to the private sector in the context of § 9.

On several prior occasions this Court has acknowledged that Congressional re-enactments and/or amendments to pre-existing statutory framework are useful indicators of approval of administrative interpretation and application. *Lindahl v. OPM*, 470 U.S. 768, 782 & n.15, 105 S.Ct. 1620, 84 L.Ed.2d 674 (1985) ("[T]he fact that Congress amended [the statute] in 1980 without explicitly repealing the established [construction standard] itself gives rise to a presumption that Congress intended to embody [the standard] in the amended version of [the statute]."); *U.S. v. Sheffield Bd. of Comm'rs*, 435 U.S. 110, 132-35, 98 S.Ct. 965, 55 L.Ed.2d 148 (1978); *Albemarle Paper Co. v Moody*, 422 U.S. 405, 414 n.8, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). This Court has even inferred approval of administrative or judicial constructions of legislative language from mere Congressional inaction in amending the underlying legislation. *Johnson v. Transportation Agency*, 480 U.S. 616, 629 n.7, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987). While such cases by no means suggest that subsequent Congressional enactments can resuscitate a regulation which clearly has no statutory underpinnings, in this instance virtually the only inference that can be drawn from Congress' purposeful decision to amend the ESA to create permissive private sector

exemptions for "incidental takes" is that in doing so Congress simultaneously expressed its approval of the underlying regulatory definition. Cf. *U.S. v. Riverside Bayview Homes*, 474 U.S. 121, 137-39, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985).

By enacting the 1982 amendments to the ESA, Congress adjusted the very manner in which the regulation of "take" was being administered and left other integral features of the § 9 "take" concept untouched. Indeed, the legislative history of the 1982 amendments explicitly recognized that a § 9 "take" brought about by habitat modification would be suitable for the "incidental takes" permitting process being established. *See* H.R. Rep. No. 835, 97th Cong., 2d Sess. 30-31 (1982) and S.Rep. No. 418, 97th Cong., 2d Sess. 10 (1982). These circumstances alone belie any "clear determination by Congress that the prohibitions of § 9 should not reach habitat modifications." 30 F.3d at 193. Rather, all indications favor the view that the FWS's inclusion of restrictions on habitat destruction within the purview of the ESA is entirely consistent with Congressional intent.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the judgment below of the United States Court of Appeals for the District of Columbia Circuit be reversed.

February 21, 1995

Respectfully submitted,

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October Term, 1994

BRUCE BABBITT, SECRETARY
OF THE INTERIOR, ET AL.,

Petitioners,

v.

SWEET HOME CHAPTER OF COMMUNITIES
FOR A GREAT OREGON, ET AL.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit**

BRIEF OF AMICUS CURIAE STATE OF ARIZONA EX REL. M.J. HASSELL, ARIZONA STATE LAND COMMISSIONER AND STATE OF COLORADO IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The State of Arizona, *ex rel.* M. J. Hassell, Commissioner of the Arizona State Land Department ("State Land"), administers approximately nine and a half million acres of land, or roughly thirteen percent of all lands within the State of Arizona. The United States Congress granted these lands in trust to the State of Arizona for the benefit of public schools and other institutions, as part of the intergovernmental contracts by which Arizona was made a Territory and then admitted to the Union. Similar grants were made to Colorado, which now owns approximately three million acres, and to most other states admitted after formation of the Union.

Reinstatement of the sweeping definition of "harm" in 50 CFR § 17.3 (the "harm" regulation) struck by the lower court would place State Land in the untenable position of choosing between its mission to use trust lands to provide revenues for the benefit of Arizona schools and public institutions, and possible criminal prosecution if it uses school trust lands in a manner considered by United States Fish and Wildlife Service ("FWS") to be harmful to listed species.[1]

The dilemma is significant, given the scope of recent FWS attempts to secure additional wildlife habitat. For example, recent FWS regulations propose to designate 4.7

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[1] Persons guilty of a prohibited act of "harm" may be imprisoned for up to one year and fined up to $100,000 for each member of the species taken. 16 U.S.C. § 1540(b); 18 U.S.C. §§ 3559, 3571.

million acres of land in Arizona and New Mexico, including 3,333 acres of Arizona's school trust land, as critical habitat for the Mexican spotted owl;[2] about 300 miles of rivers and streams in Arizona, including several thousand acres of school trust land, as critical habitat for three cactus ferruginous pygmy owls;[3] and 280 miles of riparian habitat in Arizona, including several hundred acres of school trust land, for the southwestern willow flycatcher.[4] Through the "harm" regulation, the designation of these lands as critical habitat subjects them to various management restrictions, such as prohibitions on grazing, certain water uses, the thinning of timber, and even something as basic as preventing fires. The "harm" regulation thus interferes with State Land's fiduciary duty by imposing management restrictions that constrain the use, management and disposition of school trust lands.

State Land supports the objectives of programs which preserve essential wildlife habitats and promote the health and biodiversity of ecosystems. However, the worthiness of FWS's goal cannot justify its unauthorized use of the "harm" regulation to criminalize ordinary land use in order to coerce states and other entities to make

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[2] *Proposed Determination of Critical Habitat for the Mexican Spotted Owl*, 59 Fed. Reg. 63162, 63167 (Table 1) and 63171 et seq. (proposed Dec. 7, 1994).

[3] *Proposed Rule to List the Cactus Ferruginous Pygmy-Owl As Endangered With Critical Habitat in Arizona and Threatened in Texas*, 59 Fed. Reg. 63975, 63982 and 63985-86 (proposed Dec. 12, 1994).

[4] *Proposed Rule to List the Southwestern Willow Flycatcher As Endangered With Critical Habitat*, 58 Fed. Reg. 39495, 39509-39527 (proposed July 23, 1993).

nonfederal lands available as wildlife habitat without compensating landowners for the use of those lands.[5]

SUMMARY OF ARGUMENT

The legislative history, structure of the Act, and general principles of statutory construction all indicate that Congress did not intend Section 9 of the Endangered Species Act (hereinafter "the Act") to encompass habitat modifications as defined by Petitioner's "harm" regulation. In that regard, State Land concurs with, but will not reiterate, the lower court's analysis and the arguments presented by Respondents and Amicus Curiae State of California, *et al.* and the lower court. As additional support for the lower court's decision, State Land identifies issues that are of particular concern to State Land and other nonfederal governmental entities.

First, the "harm" regulation extends the reach of the Act in a manner that shifts the economic burdens of federal objectives to nonfederal property owners. This attempted extension by FWS departs from Congress' statutory scheme, which burdens only federal agencies and offers states cooperation and incentives rather than coercion.

Second, the "harm" regulation raises constitutional issues that otherwise could be avoided. Congress itself questioned the authority of the federal government to

[5] The parties have consented to the filing of this brief by State Land. Letters of consent have been filed with the Clerk pursuant to Rule 37.3 of the Rules of this Court.

regulate nonfederal land and flora. The taking of an interest in state trust lands (a conservation easement for the benefit of wildlife) without compensation is contrary to state and federal law, and may create a Fifth Amendment right to compensation for the interest taken. This Court should avoid interpreting the Act in a manner that creates unfunded monetary liabilities for the federal government. Moreover, because it imposes strict criminal liability for ordinary land uses, such as removal of vegetation from private lands, under variable, ill-defined conditions that are not self-evident, the "harm" regulation may be unconstitutionally vague as applied. Instead of affording deference to the regulation, this Court should construe the criminal provisions of the Act narrowly under the rule of lenity. The gap between the words used by Congress and the regulation also raises concerns about improper delegation of legislative authority.

Third, the "harm" regulation represents a federal agency's unilateral attempt to alter the balance of power between the states and the federal government. Congress deferred authority over nonfederal land management to the states by structuring the Act to provide for the conservation of habitats primarily through its directions to *federal* agencies, and by choosing to protect habitats on nonfederal lands through a land acquisition program and financial incentives to states. The Secretary should be no less respectful of state interests. When a particular interpretation of an Act of Congress may "upset the usual constitutional balance of federal and state powers . . . it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this

balance." *New York v. United States*, 112 S. Ct. 2408, at 2425 (1992) (*quoting Gregory v. Ashcroft*, 111 S. Ct. 2401 (1991)).

All of these concerns raise issues of constitutional significance that could be avoided by affirming the decision of the lower court. "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. De-Bartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

ARGUMENT

The Lower Court Correctly Concluded That The "Harm" Regulation Is Invalid On Its Face As An Appropriation Of Authority By FWS That Was Neither Expressly Conferred, Nor Intended, By Congress.

A. Congress Intended to Impose the Burdens of the Act's Mandated Conservation Measures Upon the Federal Government.

The lower court explained how the structure of the Act operates to "assign the primary task of habitat preservation to the [federal] government," with private persons acting only if they were "willing landowners" assisted by the federal government. Petitioners' Brief at App. 7a-9a, *Sweet Home* (No. 94-859). The agency's "harm" regulation is an unreasonable interpretation of Section 9 of the Act because it attempts to shift substantial costs and burdens of habitat conservation from the federal government to nonfederal entities without any congressional direction.

Petitioners attempt to minimize the importance of this shift by characterizing the regulation as limited in scope and innocuous in effect,[6] but it is obvious that the regulation would not have engendered the controversy presently before this Court if its effects were trivial. The federal mandate to manage literally millions of acres of land, significant water resources and associated aquatic and riparian habitats[7] primarily for the benefit of endangered species has generated tremendous political controversy and opposition to the Act. *See generally* James Salzman, *Evolution and Application of Critical Habitat Under the Endangered Species Act*, 14 Harv. Envtl. L. Rev. 311, 318, 331-339 (1990).

Arizona's school trust lands provide ready examples of the ways in which the "harm" regulation shifts the economic burdens of habitat conservation to nonfederal property. Much of the school trust land in Arizona is

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[6] Petitioners' Brief at 47-48, *Sweet Home* (No. 94-859); *see also* Amicus Curiae Brief for National Wildlife Federation, *et al.* at 13-16, *Sweet Home* (No. 94-859).

[7] For example, in addition to the millions of acres proposed as critical habitat for the Mexican spotted owl (Proposed Determination of Critical Habitat for the Mexican Spotted Owl, *supra*, note 2), approximately 6.9 million acres have been designated as critical habitat for the Northern spotted owl. *Determination of Critical Habitat for the Northern Spotted Owl*, 57 Fed. Reg. 1796, 1809 (Jan. 15, 1992). Approximately 3.8 million acres have been designated as critical habitat for the California gnatcatcher. *Special Rule Concerning Take of the Threatened Coastal California Gnatcatcher*, 58 Fed. Reg. 65088, 65090 (Dec. 10, 1993). Approximately 6.5 million acres have been proposed as habitat for the desert tortoise. *Determination of Critical Habitat for the Mojave Population of the Desert Tortoise*, 59 Fed. Reg. 5820, 5827 (Feb. 8, 1994). These are but a few of many examples.

suitable only for grazing or agriculture; there is no other economic use to which they may be put. Yet on some of these lands, FWS has proposed to prohibit grazing, or restrict water use, or prohibit channelization that would prevent flood erosion.[8]

State Land's timber property, near Flagstaff, is home to Mexican spotted owls. According to FWS management guidelines, State Land must manage these lands to provide habitat for the owl, which makes timber harvest either prohibited or not economic, and prohibits removal of dead and down woody material that provides cover for prey species and fuel for forest fires. Not only do these management restrictions effectively eliminate

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[8] *See, e.g., Final Rule Determining Endangered Status for the Southwestern Willow Flycatcher*, 60 Fed. Reg. 10694, 10714 (restrictions on grazing and water use and diversion); *Proposed Rule to List the Cactus Ferruginous Pygmy-Owl As Endangered With Critical Habitat in Arizona and Threatened in Texas*, 59 Fed. Reg. 63975, (Dec. 12, 1994) (restrictions on grazing, water uses, flood control and channelization); *Proposed Determination of Critical Habitat for the Mexican Spotted Owl*, 59 Fed. Reg. 63162, 63163 and 63169, (Dec. 7, 1994) (restrictions on removal of timber and other vegetation); *Determination of Threatened Status for the Northern Spotted Owl*, 55 Fed. Reg. 26114 (June 26, 1990) (restrictions on timber harvest and other vegetation removal). The Tenth Circuit has interpreted *Palila v. Hawaii Dep't of Land and Natural Resources*, 649 F. Supp. 1070 (D. Haw. 1986), *aff'd* 852 F.2d 1106 (9th Cir. 1988) to mean that "one who maintains on his own land grazing animals that so modify the natural habitat as to cause indirect injury to endangered species can be required to remove those grazing animals from his land." *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423, 1427-28 (10th Cir. 1986).

economic return from those lands,[9] they set the stage for disastrous forest fires.[10] The regulation thus transfers to the property owner, (in this case, State Land), the substantial costs that the federal government would be required to incur if it acquired these lands, or purchased a conservation easement.[11]

To diminish the force of this argument, Petitioners claim that the "harm" regulation is innocuous because it

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[9] In northern spotted owl habitat, FWS interpreted "harm" to require that timber harvesting be avoided within a circle centered on a nest or activity center within a radius of 1.2-2.2 miles, or up to 3,960 acres surrounding each spotted owl nest site, without any evidence or allegation of injury to, or intention to injure, a single spotted owl. U.S. Fish and Wildlife Service, Region 1, *Procedures Leading to Endangered Species Act Compliance for the Northern Spotted Owl* (July 4, 1990). According to one timber industry source, the economic impact of each "owl circle" could be as much as $160,000,000.00. A. Gidari, *The Endangered Species Act: Impact of Section 9 On Private Landowners*, 24 Envtl. L. 419, 421 (1994).

[10] *See* W.W. Covington and M.M. Moore, *Postsettlement Changes in Natural Fire Regimes and Forest Structure: Ecological Restoration of Old-Growth Ponderosa Pine Forests, in Assessing Forest Ecosystem Health in the Inland West*, 153-181 (R. Neil Sampson and David L. Adams eds., 1994); United States Forest Service, *Fire and Forest Health Southwestern Region* (1992).

[11] A conservation easement is a recognized interest in land which restricts the use of the land for conservation purposes. *See* Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of Gross Real Covenants and Easements*, 63 Tex. L. Rev. 433, 435 (1984); Uniform Conservation Easement Act, 12 U.L.A. 66 (Supp. 1992). Most states have enacted legislation to recognize and enforce conservation easements in some form. *See* Kimberly K. Winter, *The Endangered Species Act Under Attack: Could Conservation Easements Help Save the ESA?* 13 N. Ill. U. L. Rev. 371, 385 n. 114 (1993).

is enforced infrequently. While it may be true that to date there have been relatively few reported cases in which FWS has sought criminal penalties in connection with activities that modify habitats on nonfederal lands, the number of such prosecutions is likely to increase if the regulation is reinstated by this Court, because the pressure on FWS to prosecute, through civil enforcement actions and otherwise, undoubtedly will escalate. Furthermore, the mere threat of criminal prosecution or civil suit under Section 9 may be sufficient to accomplish FWS objectives, particularly when the threat is made to state and local officials or owners of extensive lands that may be affected by a particular management restriction.[12]

Petitioners and their amici also argue that the "harm" regulation should be reinstated because to do so would foster the broad congressional purposes of the Act, citing an often-quoted passage from this Court's opinion in *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978),

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[12] Threats of prosecution may be expressed or implied by the text of FWS regulations. *Supra* note 10. FWS reportedly has threatened state and local officials in California, Washington and Texas with criminal investigation and prosecution for approving or permitting activities on private land. See Robert D. Thornton, *The Endangered Species Act: Searching for Consensus and Predictability: Habitat Conservation Planning Under the Endangered Species Act of 1973*, 21 Envtl. L. 605, 613-614 (1991) (quoting a FWS letter to a Planning Director of a California city with respect to a zoning action); Albert Gidari, *The Endangered Species Act: Impact of Section 9 on Private Landowners*, 24 Envtl. L. 419, 430-435 (1994) (describing FWS letters to the Washington Forest Practice Board); *Sierra Club v. Babbitt*, 995 F.2d 571 (5th Cir. 1993). Landowners with extensive holdings, such as State Land, are targets of FWS attention, and are therefore particularly vulnerable to threats of "take" prosecutions.

which declared that "[t]he plain intent of Congress in enacting this statute [the Endangered Species Act] was to halt and reverse the trend toward species extinction, *whatever the cost*." (Emphasis added.) Petitioners' reliance upon this passage is misplaced.[13] The costs to which this Court referred in *Tennessee Valley Authority v. Hill* were costs that would result from the enforcement of the Act's constraints upon *federal* activities, and that would be borne by the *federal* government, not costs that would be imposed upon nonfederal landowners.

In contrast, the "harm" regulation provides a means by which FWS may control wildlife habitats on nonfederal lands without the cost of acquiring a conservation easement or other federal property right.[14] The congressional findings and declaration of the purposes and policy of the Act (16 U.S.C. § 1531, Petitioners' Brief at App.

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[13] In direct response to this Court's decision halting construction of the Tellico Dam, Congress encacted the 1978 amendments to the Act. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3752. Among other things these amendments established a procedure whereby federal agencies may obtain exemptions from the requirements of the Act. 92 Stat. at 3753-3760 (16 U.S.C. § 1536). They also provided that economic and other impacts may be considered in connection with the designation of critical habitat. 92 Stat. at 3766 (16 U.S.C. § 1533(b)(2)). The Act thus no longer requires conservation of endangered species "whatever the cost."

[14] Petitioners and their amici tacitly acknowledge this fact. Petitioners' Brief at 49, Brief of Amici Curiae Scientists at 17-19, Brief of Amicus Curiae Friends of Animals, Inc., at 8-9, *Sweet Home* (No. 94-859).

at 1a-3a, *Sweet Home* (No. 94-859), and the Act's legislative design, which includes specific mechanisms to preserve wildlife habitats at *federal* expense, contradict the necessary assumption that underlies the "harm" regulation, that Congress somehow intended to shift the *economic* burdens of species conservation from the federal government to nonfederal governmental entities and private persons through Section 9 of the Act. This Court should not allow a lone agency to ignore Congress' intent and shift costs elsewhere.

B. Affirming Invalidation of the "Harm" Regulation Would Avoid Substantial Constitutional Questions.

This "Court, where possible, interprets congressional enactments so as to avoid raising serious constitutional questions." *Cheek v. United States*, 498 U.S. 192, 203 (1991). "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. De-Bartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The Secretary's construction of Section 9 of the Act as authorizing FWS to regulate and constrain the use of nonfederal land and to criminalize ordinary land use activities implicates serious constitutional issues that could be avoided by affirming the lower court's opinion invalidating the regulation.

1. Section 9, As Construed By The "Harm" Regulation, Will Result In Claims For Compensation For The Taking of Nonfederal Property.

The cost-shifting effects of the "harm" regulation are particularly troublesome to State Land because its extensive holdings of land are subject to legal restrictions that flow from the federal government's compact with the State of Arizona, made when the lands were granted to the State. These compacts, and their legal significance, were summarized by the dissent in *Andrus v. Utah*, 446 U.S. 500, 522-524 (1980) (Powell, J., dissenting):

> When the first 13 States formed the Union, each State had sovereign authority over the lands within its borders. These lands provided a tax base for the support of education and other governmental functions. When settlers sought to carve the State of Ohio from the Northwest Territory in 1802, they encountered a different situation. Vast tracts within the boundaries of the proposed State belonged to the Federal Government. Thus, the new State's potential revenue base would be restricted severely unless the Federal Government waived its immunity from taxation. In order to place Ohio on an equal footing with the original States, Congress enacted a compromise drawn from the Land Ordinance of 1785 and the Northwest Ordinance of 1787. The compromise set a pattern followed in the admission of virtually every other State. Specific details varied from State to State, but the basic plan persisted. As consideration for each new State's pledge not to tax federal lands, Congress granted the State a fixed proportion of

> the lands within its borders for the support of public education.
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> These agreements were solemn bilateral compacts between each State and the Federal Government. For its part, the Government granted the State specific sections of land within each township laid out by federal survey . . . In return, Congress required the State to memorialize its pledge not to tax federal lands "by ordinance irrevocable without the consent of the United States." *E.g.*, Act of July 16, 1894, § 3, 28 Stat. 108 (Utah). Congress also imposed upon the State a binding and perpetual obligation to use the granted lands for the support of public education. All revenue from the sale or lease of the school grants was impressed with a trust in favor of the public schools. No State could divert school lands to other public uses without compensating the trust for the full market value of the interest taken. *Lassen v. Arizona ex rel. Arizona Highway Dept.*, 385 U.S. 458, 87 S. Ct. 584, 17 L.Ed. 2d 515 (1967); *see Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 96 S. Ct. 910, 47 L.Ed. 2d 1 (1976).

[Some citations omitted.]

It is well established that the federal government may condemn state lands, *see Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941), and school trust lands are no exception to that principle. *United States v. State of Montana*, 134 F.2d 194, 196 (9th Cir. 1943). However, this Court has stated that "Congress could not, without making provision for payment of compensation, pass a law depriving a State of land vested in it by the Constitution. Such a law . . . would constitute a taking of

the State's property without just compensation, in violation of the Fifth Amendment." *Block v. North Dakota*, 461 U.S. 273, 291 (1983). Absent some reserved right created by the instrument of conveyance or statute pursuant to which the lands were granted, this rule appears equally applicable to lands vested in a state by Congress.[15]

The requirement that nonfederal land be maintained in a particular condition (usually undeveloped), for *use and occupancy by* wildlife is tantamount to an appropriation of an easement or similar estate in land. When such a servitude is imposed, a taking may be found. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987) (permit conditioned upon public access easement found to be a taking); *Lucas v. So. Carolina Coastal Council*, 112 S. Ct. 2886, 2895 (1992) (ban on construction on beach lots found to be a taking). In *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), this Court struck down a municipal ordinance that conditioned approval of a building permit upon the landowner's dedication of portions of the property to the city for greenway and a pedestrian bicycle pathway, both laudable public purposes. In so holding, the Court observed that "[o]ne of the principal purposes

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[15] Since this Court's decision in *Lassen v. Arizona*, 385 U.S. 458 (1967), it generally has been accepted that states may not grant to the United States a right-of-way or other interest in school trust lands without compensation. *See, e.g., United States v. 78.61 Acres of Land in Dawes and Sioux Counties*, 265 F. Supp. 564 (Neb. 1967); *United States v. 111.2 Acres of Land in Ferry County*, 293 F. Supp. 1042 (E.D. Wash. 1968), *aff'd*, 435 F.2d 561 (1970); *State of Utah v. Andrus*, 486 F. Supp. 995 (Utah 1979); *Sierra Club v. Hodel*, 675 F. Supp. 594 (Utah 1987), *aff'd in part and rev'd in part*, 848 F.2d 1068 (1988).

of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the whole.' *Armstrong v. United States*, 364 U.S. 40 (1960)". *Dolan*, 114 S. Ct. 2309. That is precisely the effect of the "harm" regulation, and an important reason why it properly was held invalid.

Because Fifth Amendment takings are compensable, a statute which results in such takings is not thereby rendered unconstitutional. *See United States v. Bayview Homes, Inc.*, 474 U.S. 121, 127-28 (1985); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 125-36 (1974). Nevertheless, the potential for the "harm" regulation to result in Fifth Amendment takings weighs against its validity, because of the concomitant impact upon budgetary priorities established by Congress. Considering the entrenched deficit with which Congress continually struggles, this Court should avoid interpreting the Act in a manner that creates unfunded monetary liability for the federal government, as such liabilities would circumvent congressional prerogatives to raise revenue and appropriate funds. *See* U.S. CONST., art. I, §§ 8 and 9; *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994); *NBH Land Co. v. United States*, 576 F.2d 317 (Ct. Cl. 1978).

2. Section 9, As Construed By the "Harm" Regulation, May Be Unconstitutionally Vague.

The "harm" regulation also presents Fifth Amendment void-for-vagueness problems because the "take" prohibition is a strict liability statute without a scienter requirement, *see United States v. Nguyen*, 916 F.2d 1016

(5th Cir. 1990), and the statute does not give fair notice as to what constitutes illegal conduct. This problem was described in *United States v. Rollins*, 706 F. Supp. 742 (D. Idaho 1989), in which the court found the "take" provisions of the Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. §§ 703 and 707, void for vagueness as applied to ordinary farming practice that actually killed migratory birds. Rollins, an Idaho farmer, was prosecuted when a flock of geese died after consuming alfalfa that had been sprayed with pesticides. Based upon his prior experience, Rollins believed the spraying of pesticides posed no danger to the geese. The court concluded that the MBTA did not give fair notice that such conduct was illegal:

> A farmer like Rollins is exposed to sanctions because he tended his crops in the same manner as other area farmers. These examples make one queasy about the reach of strict liability criminal statutes. . . . Under our system of government, "which is designed to foster individual liberty and restrict the arbitrary exertion of governmental authority," *United States v. Stenberg*, 803 F.2d 422, 435 (9th Cir. 1986), a criminal statute must define the offense "with sufficient definiteness that *ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.*" *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858, 75 L.Ed.2d 903 (1983).

706 F. Supp. at 744 (emphasis supplied). The court emphasized that FWS's interpretation of the statute criminalized ordinary activities:

> An ordinary person would not expect Rollins' conduct to be criminal. The statute itself does not state that poisoning of migratory birds by

> pesticide constitutes a criminal violation. Such specificity would not have been difficult to draft into the statute. Farmers have a right to know what conduct of theirs is criminal, especially where that conduct consists of common farming practices carried on for many years in the community.

706 F. Supp. at 744.

The "harm" regulation suffers from similar infirmities. Due to its indirect approach to the issue of "take," the regulation may criminalize ordinary activities, such as harvesting timber, clearing weeds, irrigating crops, and channelizing streams to protect arable fields.[16] These activities may be criminal only at certain times of the year, or in certain locations, so the regulation easily could become "little more than a trap for those who act in good faith." *See Colautti v. Franklin*, 439 U.S. 379, 395 (1979). Because the standard by which "harm" may be determined is itself vague, there is potential for selective and discriminatory enforcement.[17]

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[16] *See* note 8, *supra*.

[17] For example, it is left to FWS to determine what behavioral patterns are "essential," whether those patterns have been "significantly impaired," and whether, as a consequence, wildlife (individuals or species as a whole) has been "injured". FWS has taken the position that reduced breeding success can be an actual injury even without physical injury or death of a known individual. *Sierra Club v. Lyng*, 694 F. Supp. 1260, 1271-72 (E.D. Tex. 1988), *aff'd in pertinent part sub nom, Sierra Club v. Yeutter*, 926 F.2d 429, 438-39 (5th Cir. 1991); *Palila, supra*. These are issues as to which scientists may disagree, and which are not at all obvious to ordinary persons whose activities are not directed at wildlife.

A vagueness challenge that does not involve First Amendment freedoms must be examined in light of the facts of the case at hand. *See United States v. Mazurie*, 419 U.S. 544 (1975). Even if this Court finds that Respondents' challenge to the "harm" regulation does not squarely present the vagueness issue, the Court should consider the likelihood that the issue will be presented in a proper case, because invalidation of the regulation would avoid the issue entirely.

3. The Harm Regulation Is Constitutionally Suspect As An Overbroad Construction Of A Criminal Statute.

This Court should not conclude lightly that by the use of the word "harm," in the context of a statutory provision heretofore applied to the intentional capture or killing of specific animals, Congress intended to criminalize otherwise lawful land uses on nonfederal lands. Had Congress so intended, it would have said so explicitly. This Court wisely insists on clear statutory statement before it will transform ordinary activities into crimes. *See, e.g., United States v. X-Citement Video*, 115 S. Ct. 464, 467-68 (1994).

Where, as here, a statutory term has civil and criminal consequences, the rule of lenity requires courts to "resolve . . . ambiguity in [the defendant's] favor." *United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2109-10 (1992) (plurality opinion); *Crandon v. United States*, 494 U.S. 152 (1990). The rule of lenity should prevail over any form of deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837

(1984), because it reflects concern about constitutional principles, such as the improper delegation of legislative authority and due process. *See Note, Increased Scrutiny for the Administrative Crime*, 77 Cornell L. Rev. 612, 642-46 (1992). If Congress did intend the word "harm" to encompass habitat modification, then it failed to "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform," and the regulation is invalid as the product of a forbidden delegation of legislative power. *Touby v. United States*, 500 U.S. 160 (1991).

In fact, FWS has adopted a schizophrenic approach to the issue of habitat modification on nonfederal lands that reflects the absence of an intelligible, conforming principle. On the one hand, in the 1978 House hearings, FWS claimed that the designation of critical habitat would have no direct impact on the environment.[18] On the other hand, habitat is only critical if it is essential to species survival, and therefore it logically follows that using the FWS definition of "harm," conduct that renders critical

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[18] FWS claimed that:

> "[T]he designation of Critical Habitat does not have any direct impact upon the environment. The designation of Critical Habitat, in and of itself, prevents nothing, stops nothing, discourages nothing, and controls nothing. It simply designates an area that is necessary to the continued existence and possibly to the recovery of an Endangered or Threatened species. It is a biological designation."

Endangered Species Authorization: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the Comm. on Merchant Marine and Fisheries, 95th Cong., 2d Sess. 1155 (1978).

habitat unsuitable for a listed species is a "take." In fact, the "harm" regulation may have a more extensive effect upon nonfederal landowners than it does on federal agencies because FWS considers that management limitations may be applicable to lands that have not been designated as critical habitat if "harm" would otherwise result.[19] Such contradictory positions emphasize the infirmity of the "harm" regulation.

4. Constitutional Authority for the Harm Regulation Is In Doubt.

Another series of constitutional questions arises because the "harm" regulation operates as a federal constraint against modifying flora on nonfederal lands. Significant questions exist as to whether the federal government has authority under the United States Constitution to enact such legislation. See *Kleppe v. New Mexico*, 426 U.S. 529, 546 (1976) (leaving open the question of the extent, if any, to which the Property Clause empowers Congress to protect animals on nonfederal lands); *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 309-310 (1981) (Rehnquist, J., concurring); *Comment, Endangered Species Act: Constitutional Tensions and Regulatory Discord*, 4 Colum. J. Envtl. L. 97 (1977); G. Coggins,

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[19] *See, e.g., Determination of Critical Habitat for the Northern Spotted Owl; Final Rule*, 57 Fed. Reg. 1796, 1825 (Jan. 15, 1992), ("If an action that is committed by a non-Federal entity affects spotted owls, that action would be subject to review under Section 9 of the Act. Section 9 prohibits intentional and non-intentional "take" of listed species and applies regardless of whether or not the lands are within critical habitat.")

and W. Hensley, *Constitutional Limits on Federal Power to Protect and Manage Wildlife: Is the Endangered Species Act Endangered?* 61 Iowa L.J. 1099 (1976).

Congress was sensitive to these issues when it enacted the Endangered Species Act in 1973. Senator Williams' bill, as introduced, defined "take" to include "the destruction, modification, or curtailment of [a listed species'] habitat or range." *Endangered Species Act of 1973: Hearings on S. 1592 and S. 1983 Before the Subcomm. on Environment of the Senate Comm. on Commerce*, 93d Cong., 1st Sess. 27 (1973) (hereinafter *1973 Senate Hearings*). Some testimony given then in support of that language was quite similar to the arguments Petitioners and their amici now make in support of the "harm" regulation.[20] Senator Stevens, a former Solicitor of the Department of Interior, expressed concern about the scope of congressional authority to exercise jurisdiction over flora on non-federal lands:

> Senator STEVENS: I understand that, but my problem is I just wonder if we are again getting ourselves into some situation with regard to

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[20] Witnesses representing environmental groups stressed that this expanded definition of "take" was needed because "an animal or plant which is killed as a result of habitat destruction, in fact, in some respects is deader than if it is shot or chopped down, because there may be no further chance for its kind to ever return to that area." *1973 Senate Hearings* at 80 and 86 (testimony of John Grandy of the National Parks and Conservation Association); *see also id.* at 104 (similar statement by Tom Garrett of Friends of the Earth), 81 and 108 (additional statements by Mr. Grandy), 123-125 (statement of Stephen R. Seater of Defenders of Wildlife), and 129 (statement of Robert Hughes of the Sierra Club).

> extension of Federal jurisdiction to flora in private hands.

1973 Senate Hearings at 90. The Senate Committee later deleted the "habitat modification" language, and its report stressed that the States should have the lead "in protecting domestically endangered species," with the federal role primarily being to appropriate funds "to acquire lands" and to support the efforts of States. S. Rep. No. 93-307, 93d Cong., 1st Sess. at 2-5, *reprinted in* 1973 U.S.C.C.A.N. 2989, 2991-93.

Similar comments and concerns were expressed in the House. At the 1973 House hearings, environmental groups urged that the House bill's definition of "take" be expanded to include "habitat modification." *See Endangered Species: Hearings on H.R. 376 and Other Bills Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 93d Cong., 1st Sess. 251, 287, 299, 301, 307 (1973) (hereinafter *1973 House Hearings*). Representative Dingell objected, stating:

> I am sympathetic with your goal of preserving the species from not only the actual, direct taking, but also from habitat change. I wonder if it would not better serve to protect habitats . . . to leave the term "taking" as it is with perhaps some additional language relating to other matters.

1973 House Hearings at 305. The House Committee did not expand the term "take" to include "habitat modification." Representative Sullivan explained:

> [The ESA] will meet this [destruction of a habitat] problem by providing funds for acquisition

> of critical habitat [because private landowners] are understandably unwilling to do so at excessive cost to themselves.

119 Cong. Rec. 30,162 (daily ed. Sept. 18, 1973).

The 1982 Senate hearings reveal that the U.S. Department of the Interior had continuing questions over its constitutional authority to regulate removal of plants (modification of habitat) on private lands. G. Ray Arnett, the Assistant Secretary of the Interior for Fish, Wildlife and Parks, testified as follows:

> Senator CHAFEE: Mr. Arnett, under section 9, dealing with taking, there is nothing involved in the taking of individual species of endangered plants. We are going to have testimony, I am sure, asking for the expansion of the act's prohibitions to include the takings under section 9 for plants. What do you think of that?
>
> Mr. ARNETT: We have given this much thought, Senator, and are studying the question and would like to get back to you on this because there seems to be a constitutional question raised about the applicability of this particularly on private lands. . . . [W]e are looking at the constitutionality of it as prohibiting [the] taking on private lands, a guy's backyard, or ranch, or farm. I don't know where we are going to come back on that as yet. I would be happy to get back to you on that.
>
> Senator CHAFEE: Whatever the constitutional problems, it would seem to me that they would apply to fish and wildlife as much as plants if the problem is private lands, wouldn't it?
>
> Mr. ARNETT: Not to my knowledge sir. I am not an attorney. I am just listening to the problems

> that our Solicitor raises along these lines. As I say, it is being studied right now. On Federal lands we currently have the authority that makes this possible. We may not have the additional authority on other lands. It may be detrimental. It may not. It may be unconstitutional.

Endangered Species Act Amendments of 1982: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. On Environment and Public Works, 97th Cong., 2d Sess. 10 (1982).

Congress was aware of concerns about the extent of its constitutional authority to regulate habitats on nonfederal lands. Both houses deleted language that would have explicitly granted such authority to FWS. Accordingly, neither the inclusion of the word "harm" nor the ambiguous incidental "take" provisions added by Congress in 1982 should be construed as granting or confirming FWS's authority to regulate the modification of a habitat on nonfederal lands. "Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987); *cf. John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 526 (1993).

C. The Act Should Not Be Construed in a Way That Intrudes Upon Traditional State Authority Over Nonfederal Lands and Upsets the Balance of Federal and State Powers.

Even if this Court somehow finds that the intent of Congress was ambiguous, the lower court's decision should be affirmed because the regulation intrudes upon

the States' traditional police power to regulate land use, and thereby alters the balance of power between the states and the federal government. This is particularly important because "the political debate at the hearings had focused on federal-state sovereignty. . . . " Salzman, *supra*, 14 Harvard Envt'l L. Rev. 311, 316. When this Court is urged to interpret an Act of Congress in a way that may "upset the usual constitutional balance of federal and state powers . . . it is incumbent upon the federal courts to be *certain* of Congress' intent before finding that federal law overrides this balance." *New York v. United States*, 112 S. Ct. 2408 at 2425 (1992) (emphasis supplied), (*quoting Gregory v. Ashcroft*, 111 S. Ct. at 2401 (1991)).

Congressional intent has become of paramount importance to the determination of when an Act of Congress has transgressed the limitations of the Tenth Amendment. Over time the line of demarcation between state and federal authority has become increasingly difficult to discern. Whereas formerly the Court determined transgressions by reference to "integral" or "traditional" powers, in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 566 (1985), the Court reasoned that because the residuary sovereignty of the states is secured by the procedural safeguards inherent in the structure of the federal system, the limits of federal authority should not necessarily be defined with reference to "integral" or "traditional" powers. 469 U.S. at 552-555. Under this analysis, the "harm" regulation is invalid because it skews the effects of the political process upon the Act.

The Act resulted from a political process in which deference to states featured prominently. Congress chose

to direct state activity regarding endangered species through incentives and cooperation, rather than direct regulation of nonfederal lands. By refraining from regulation of nonfederal lands, Congress continued its traditional deference to state law in matters of land use, a deference which is apparent in other sections of the ESA. *See, e.g.*, 16 U.S.C. §§ 1533(d), 1535(c)(1)(E)(ii), and 1535(g)(2)(B).

Congress has regularly demonstrated a large degree of deference to states in regard to real and personal property rights and land use planning matters, which traditionally have been considered within the exclusive authority of states. As this Court stated in *United States v. Fox*, 94 U.S. 315 (1876):

> [T]he title and modes of disposition of real property within the State, whether inter vivos or testamentary, are not matters placed under the control of federal authority. Such control would be foreign to the purposes for which the Federal Government was created, and would seriously embarrass the landed interests of the State.

94 U.S. at 320-321. *See also United States v. State of California*, 281 F.2d 726 (9th Cir. 1960); *see generally Katzenbach v. McClung*, 379 U.S. 294 (1964). This deference includes direction to federal agencies to cooperate with local land use planning and zoning measures that would otherwise not apply to federal property. *See, e.g., Federal Urban Land Utilization Act*, 40 U.S.C. § 533; *Federal Land Policy and Management Act of 1976*, 43 U.S.C. § 1701, particularly § 1712(c)(9). State regulation of wildlife habitat is also an area of historic state dominance and congressional deference. *See Geer v. Connecticut*, 161 U.S. 519 (1896), *overruled*

on other grounds, Hughes v. Oklahoma, 441 U.S. 332 (1979). In areas where states historically have played a major role, this Court wisely does not interpret ambiguous federal legislation as displacing that role. *See United States v. New Mexico*, 438 U.S. 696, 715 (1978).

Considering the long history of congressional deference to states in the management of nonfederal lands and natural resources, which is reiterated in the Act, it is inconceivable that Congress would so radically alter that policy by the use of a single word in a section of the Act that does not even mention habitat modification. This Court should not permit a single-purpose federal agency to override the political process and usurp state authority over land uses, which are fundamental to the health and welfare of citizens.

The suggestion by amici scientists (Brief of Amicus Curiae Scientists, *Sweet Home* (No. 94-859) at 24-26) that this Court should expand federal authority to protect species through the "public trust" doctrine in order to validate the assumption of power by FWS is both legally unsound and bad public policy. *See generally*, Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 Iowa L. Rev. 631 (1986). This Court need not and should not become a party to the agency's intrusion upon legislative prerogatives and state interests by extending a doctrine that historically has been limited to public rights in navigable waters and their submerged streambeds to encompass the much broader issue of wildlife habitat conservation.

Finally, FWS threats to prosecute state officials for "take" violations if they issue permits or otherwise authorize uses of nonfederal lands that FWS considers harmful to endangered species implicates the concerns about political accountability that have troubled this Court in the past:

> [W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. . . . [Whereas if the Federal Government legislates directly, thereby making the decision] in full view of the public . . . it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. . . . [W]here the Federal Government directs the States to regulate, it may be state officials who bear the brunt of public disapproval, while the federal officials who devised the regulatory program remain insulated from the electoral ramifications of their decisions. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.

New York v. United States, 112 S. Ct. at 2424 (citations omitted). By authorizing wildlife biologists to coerce nonfederal governments to regulate nonfederal lands in accordance with the needs of endangered species, the "harm" regulation acquires the potential to become the greatest of all unfunded federal mandates,[21] as well as

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[21] In fact, the enormous cost of preserving habitats on nonfederal lands, and (by inference) the unavailability of federal funds to acquire such habitats, is offered by amici scientists as a

shifting liability from the federal government to the states.[22]

These troubling issues may and should be avoided completely by this Court affirming the lower court's conclusion that the "harm" regulation is invalid because it exceeded the authority granted by Congress.

CONCLUSION

For the reasons stated, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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March 22, 1995

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justification for the regulation. Brief of Amici Curiae Scientists, *Sweet Home* (No. 94-859) at 17-19.

[22] For example, land use restrictions imposed under the threat of a "take" prosecution may result in the assertion of inverse condemnation claims against a state for refusing to issue a permit otherwise authorized by applicable state law, whereas the liability should be that of the federal government.

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No. 94-859

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

BRUCE BABBITT, SECRETARY OF THE INTERIOR, et al.,
Petitioners,

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR
A GREAT OREGON, et al.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR CARGILL, INCORPORATED, AMICUS CURIAE SUPPORTING AFFIRMANCE

INTEREST OF THE AMICUS

Cargill, Incorporated (besides its holdings in other states) is the successor of Leslie Salt Co. and, as such, is the largest private landowner in the San Francisco Bay area, owning some 25,000 acres and holding a perpetual lease over an additional 15,000 acres. On much of the acreage, the company is engaged in salt-making by a process of evaporation and precipitation. Included are significant areas of present or former salt marsh, where two endangered species, the salt marsh harvest mouse and the California clapper rail, have been found. All of the land, whether or not still actively used

for salt-making, is protected by historic levees which have come to be used by two other protected species, the California least tern and the western snowy plover. The necessary periodic repair of the levees and the salt operations involve some disturbance of the habitat of these protected species and, accordingly, implicate the Fish and Wildlife Service's "harm" regulation invalidated by the Court of Appeals in the present case. Nor would it be surprising if other (or newly listed) protected species were discovered on Cargill's lands in due course.

What is more, Cargill is not free to wait and see — at its peril — whether the Fish and Wildlife Service, or an environmental group, will in fact assert a violation of Section 9 of the Endangered Species Act, as construed in the challenged regulation. The reason is that the U.S. Army Corps of Engineers asserts regulatory jurisdiction over large portions of Cargill's acreage around San Francisco Bay. See, e.g., *Leslie Salt Co. v. Froehlke,* 578 F.2d 742 (9th Cir. 1978); *Leslie Salt v. United States,* 896 F.2d 354 (1990), *cert. denied,* 498 U.S. 1126 (1991); *Leslie Salt Co. v. U.S.,*789 F.Supp. 630 (N.D. Cal. 1991). In consequence, the company has been subjected to permit conditions proposed by the Fish and Wildlife Service under the "incidental take" provisions of Section 7 of ESA. See *Cargill v. West,* No. C-92-20756-RMW (PVT) (N.D. Cal. July 12, 1994), slip op. 3.

In the circumstances, it is plain Cargill has a real interest in the outcome of this case. We believe the company's special position will bring to bear a fresh perspective that will be helpful to the Court's resolution of the issue. As will be evident, the present Brief does not merely repeat arguments already before the Court. New points are put forward.

ARGUMENT

Introduction and Summary

No one pretends that the Congress of 1973 clearly indicated — whether in the text of the statute, in its legislative history, or otherwise — an affirmative intention to encompass habitat degradation, with or without "actual killing or injuring" of a protected species, as a type of "harm" within the "take" prohibition in Section 9 of the Endangered Species Act. The debate among the judges and the lawyers accordingly centers on two other questions: (1) Whether, applying the principles of *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Act is sufficiently ambiguous on this matter as to permit the Fish and Wildlife Service to resolve it, and, if so, whether its regulation to that end is a "reasonable" implementation of the statute; and (2) whether legislative action and inaction in 1982 when Congress revisited the ESA effectively "ratified" the Service's "harm" regulation. As to the *Chevron* analysis, we submit Judge Sentelle (in what was originally a dissent, Pet. App. 68a-72a) and Judge Williams (in his second opinion, Pet. App. 2a-10a) have the best of the argument; and, likewise, we think Judge Williams's final opinion on "implied legislative ratification" (Pet. App. 10a-24a) is dispositive. It would be inappropriate for an *amicus* to recapitulate the points there made. But it may be that we can contribute a somewhat different perspective that bears on both questions.

A. In this Court, the Solicitor General has glossed over the history of the "harm" regulation and has been less than clear about its practical scope. For good reason. A closer look reveals a quite radical chopping and changing by the Fish and Wildlife Service as to the proper reach of Section 9 in respect of habitat modification. We also discover the Service's express recognition that Congress had not meant to authorize a regulation under Section 9 that would encom-

pass habitat degradation except as another means of "killing or injuring" endangered species. And, on the other hand, it emerges that, while claiming a very restrictive scope for its "harm" regulation, the Service in fact issued one that, for all its qualifiers, is almost wholly open-ended.

This history is relevant to the issues presented. First, the degree of deference due an administrative agency's regulation is, to some extent at least, diminished by repeated shifts of position, culminating in a rule that is not remotely contemporaneous with the statute it purports to implement. Moreover, a court must find it difficult to defer to an agency that says one thing and means another. It is arguable, indeed, that deference is due to the agency's articulation of *limitations* on its statutory discretion, rather than to the promulgated regulation itself, which, perhaps, should be treated as *unintentionally* broad. And, for much the same reasons, the claim of legislative ratification in 1982 is severely weakened by doubt as to whether Congress understood the true scope of the 1981 regulation in light of the misleadingly conservative description accompanying its publication.

B. So, also, the practical consequences of the "harm" regulation have not been highlighted in the Government's brief. To be sure, in seeking certiorari, it was said that the question presented was "of exceptional public importance," and that the regulation "is a critical tool in an effort to preserve listed species." Pet. 12,25. But, certiorari once granted, we hear far less about the important service performed by the regulation, now painted as adding little, if anything, to the bare statutory phrase "harm." Yet, of course, the true bite of the regulation bears on the question whether Congress can be supposed to have authorized, or later ratified, it. We accordingly discuss that aspect in a moment.

C. Having sketched the history of the "harm" regulation and examined its practical application, we briefly discuss the ultimate question, whether Congress intended to authorize this result. We note the limited provisions for habitat protection (in Sections 5 and 7 of the Act) and find these inconsistent with reading a *general* prohibition on habitat degradation into Section 9. Nor is it plausible that, having itself defined what constitutes a "taking" and having expressly rejected a proposal to include habitat modification within the definition, Congress meant to authorize the Fish and Wildlife Service radically to expand the "taking" prohibition.

Turning, finally, to the 1982 amendments to the Act, we submit that, far from justifying a broad reading of Section 9, they compel a rejection of the "harm" regulation as overstepping the congressional mandate. Indeed, the habitat protection measures now authorized to be required of federal permittees by the "incidental take" provisions added to Sections 7 and 10 would be superfluous if habitat degradation was (and is) already criminalized as a "taking" under Section 9.

With this preface, we now turn to the history of the current "harm" regulation, 50 C.F.R. § 17.3.

A. The History and Scope of the "Harm" Regulation

1. In July 1975, for the first time, the Fish and Wildlife Service proposed regulations to define certain of the terms by which the statute itself defines a "taking" of protected species under Section 9. 40 Fed.Reg. 28,712, et seq. (July 8, 1975). No definition of "harm" was then put forward, but "harass" was defined as follows (40 Fed.Reg. at 28,714):

> "Harass" in the definition of "take" in the Act means an act which either actually or potentially harms wildlife by killing or injuring it, or by annoying it to

> such an extent as to cause serious disruption in essential behavior patterns, such as feeding, breeding or sheltering; significant environmental modification or degradation which has such effects is included within the meaning of "harass,"

To say the least, this was a most unexpected stretching. A word, "harass," that connotes knowing and purposeful victimizing was forced to embrace the "effects" of "significant environmental modification" which, however unintentionally, "potentially" "disrupt[ed]" "essential behavior patterns." It is not surprising that two and a half-months later, the Service had second thoughts. 40 Fed.Reg. 44,412 et seq. (Sept. 26, 1975); see J.A. 49-51.

In September 1975, it was decided that "harass," dealing with "potential for injury," should be confined to "acts or omissions which are done intentionally or negligently," and that "the concept of environmental damage being considered a 'taking' [would be] retained, but [would] now be found in a new definition of the word 'harm.' " 40 Fed.Reg. at 44,413; J.A. 50. The latter term, it was noted, "covers actions or omissions which actually, (as opposed to potentially), cause injury." *Ibid.* The Preface to the new regulations summed up: "By moving the concept of environmental degradation to the definition of 'harm,' potential restrictions on environmental modifications are expressly limited to those actions causing actual death or injury to a protected species of fish and wildlife." *Ibid.* The new regulation — which remained in effect until mid-1981 — read as follows (40 Fed.Reg. at 44,416; J.A. 51):

> "Harm" in the definition of "take" in the Act means an act or omission which actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavioral patterns, which include, but are not limited to, breeding, feeding or sheltering; significant environmental modification or

> degradation which has such effects is included within the meaning of "harm";

This was presumably a narrowing of the original proposal (defining "harass"). But, even so, the Service in due course concluded it had strayed some considerable distance from the intent of Congress.

2. In April, 1981, Interior's Associate Solicitor submitted a written Opinion to the effect that at least one reading of the outstanding regulation went "beyond the intent of Congress," and that the Ninth Circuit had erred in *Palila v. Hawaii Dept. of Land & Natural Resources,* 639 F.2d 495 (9th Cir. 1981). 46 Fed.Reg. 29,490-29,492 (June 2, 1981). See also J.A. 66. Thereupon, in June, the Fish and Wildlife Service proposed to rewrite the "harm" regulation by substituting a simple sentence that made no reference to habitat: " 'Harm' in the definition of 'take' in the Act means an act or omission which injures or kills wildlife." 46 Fed.Reg. at 24,490.

Two aspects of this proposal should be stressed. The first is that, to fall under the prohibition, the "killing" or "injuring" of protected wildlife must be as *direct and immediate* where it results from habitat modification as in all other cases of "takings." This follows from the wording of the proposed new regulation which, as just noted, does not separate out habitat modification (indeed, does not mention it), but subsumes it as a *means* of "killing" or "injuring." The second significant point is that, just as with respect to other acts prohibited by Section 9, the "killing" or "injuring" must be of one or more *individual* members of the protected species. Indeed, the Associate Solicitor's Opinion underlying the proposal repeatedly, and pointedly, refers to the victims as "individual wildlife" or "individual fish." 46 Fed.Reg. at 29,491, 29,492. The upshot is that, under this June 1981 proposal, eventual harm, or even death, for the species as a whole, no matter how dramatic and inevitable,

was not within Section 9, unless a particular, immediate, victim could be identified.

If the regulation had remained as initially proposed, this litigation would not have come about. No one has, or would, contest the proposition that a protected animal — most obviously those confined to a limited area, such as freshwater fish and most insects — may be killed or harmed by destroying its habitat. But, although the greatest threat to an endangered species *population as a whole* is habitat destruction, the occasions when an individual member is immediately killed or injured as a result of an intrusion on its habitat must be relatively rare. One cannot posit many instances involving the filling in or draining of a landlocked pond where endangered fish live, the flooding of the burrow of a protected rodent while the rodent or its offspring are within, or the destruction of the only food source or shelter of a particular listed animal. At all events, any issue involving such a truly narrow regulation would present no "question of exceptional public importance in the administration of ESA and the protection of endangered and threatened species" requiring resolution by this Court. Pet. 12.

3. Alas, the "harm" regulation did not emerge from the notice and comment process unscathed. The proposed retrenchment provoked a hue and cry, the overwhelming number of commentors objecting to the revision as accomplishing an undue narrowing. 46 Fed.Reg. 54,748, 54,749-54,750 (Nov. 4, 1981); J.A. 66, 68-72. While the Fish and Wildlife Service purported to be holding the line, it in fact gave way substantially.

The final regulation, still in effect, was rewritten and published on November 4, 1981 to read as follows (50 C.F.R. § 17.3):

> *Harm* in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act

> may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

The full sway of the added second sentence is not self-evident on the face of the regulation. Nor did the Service, in announcing it, disclose the radical effect of the change. Indeed, most of the Preface published in the Federal Register is disarming.

Thus, it was asserted that "[t]his additional language makes it clear that habitat modification or degradation, standing alone, is not a taking pursuant to Section 9." 46 Fed.Reg. at 54,750; J.A. 72. Qualifiers abound: "*actually* kills or injures"; "*significant* habitat modification or degradation"; "*significantly* impairing *essential* behavioral patterns . . ." *Ibid.* The Preface continually incants the view that "[Congress] did not . . . express any intention to protect habitat under section 9 where there was no appurtenant showing of death or injury to a protected species" (46 Fed.Reg. at 54,749; J.A. 67), or, more pointedly, "[the contention] that habitat modification alone is a taking . . . is without support in the Act or legislative history." 46 Fed.Reg. at 54,750; J.A. 71. See also, 46 Fed.Reg. at 54,749, 54,750; J.A. 68-69, 69, 72. The Associate Solicitor's Opinion of a few months earlier is endorsed. 46 Fed.Reg. at 54,749; J.A. 70-71. And there is even the apparently flat declaration that "section 9's threshold does focus on individual members of a protected species." 46 Fed.Reg. at 54,749; J.A. 68.

Even the attentive reader — including a Member of Congress — easily might be lulled by all these caveats into supposing the final 1981 regulation was a mere statement of the obvious: that a protected animal can be killed or injured by destruction of his habitat, as well as by other means. Yet, the rule, it turns out, *is* effectively a habitat protection provision, with *no* qualification except that the habitat must

be — as the term naturally implies — actually occupied by the species for breeding or feeding or sheltering. In sum, a wolf in sheep's clothing.

The critical fact is that, after all, no *individual victim* is any longer required. So much was made explicit, albeit in a convoluted way, in the following passage (46 Fed.Reg. at 54,748; J.A. 67):

> Some of the comments in favor of the redefinition, however, viewed the action as limiting "harm" to direct physical injury to an individual member of the wildlife species. This was not the intent of the Service and the final redefinition addresses that perception. The purpose of the redefinition was to preclude claims of a Section 9 taking for habitat modification alone without any attendant death or injury of the protected wildlife. Death or injury, however, may be caused by impairment of essential behavioral patterns which can have significant and permanent effects on a listed species.

Effectively, this cancels all the emphasis on "actual" killing or injuring. Once the test is "injury to a population" (46 Fed.Reg. at 54,749; J.A. 70), it is a foregone conclusion that "significant habitat modification or degradation" that "significantly impair[s] essential behavioral patterns" will constitute the requisite "injuring." Indeed, since a "population" will be injured by failure of its members to breed, or, in some circumstances, to grow in numbers, no "injury" to any living member — beyond discouraging its breeding — is necessary. Thus, notwithstanding all the Service's disclaimers, we are back to including as a "taking" degradation of any protected species' habitat without more — assuming only that "habitat" here means an area *presently* occupied by an endangered species for feeding or breeding or sheltering.

4. Unsurprisingly, this is how most courts have understood the regulation, apparently with the approval of the Fish and Wildlife Service.

There are, it is true, a handful of cases rejecting a "taking" claim on the ground that the habitat modification is trivial or irrelevant to the life of the endangered species. See Pet. Br. 46. But the prevailing judicial reading of the Service's "harm" regulation is that it embraces habitat degradation that adversely impacts on the *future* of the population of an endangered species, without any need to show the *present* killing or injuring of any individual member.

Perhaps most instructive is the landmark *Palila* litigation, invoked here as guiding Congress in 1982 and as representing a correct resolution of the question. See Pet. 20, 21-22 and nn.20 and 21; Pet. Br. 27, 37, 45. In the first round (*Palila I*), the district court concluded that the State of Hawaii's maintenance of feral goats and sheep within the habitat of an endangered bird constituted a "taking" under Section 9 of the ESA because the game animals, by consuming their seedlings and sprouts, prevented the regeneration of trees essential to the survival of the birds. *Palila v. Hawaii Dept. of Land & Natural Resources*, 471 F.Supp. 985, 988-991, 995 (D. Haw. 1979). This was a somewhat indirect chain of causation, the basis for which was, in any event, tenuous. See 471 F.Supp. at 988 n.2. There was, in fact, no proof of "actual" killing or injuring of any individual bird. See 471 F.Supp. at 989 n.7. On appeal, moreover, the judgment was affirmed on what was deemed the sufficient basis that "the Palila was *endangered* by the [State's] activity." 639 F.2d 495, 497 (9th Cir. 1981) (emphasis added). To say the least, that formulation is very open-ended.

Five years later, a similar suit was aimed at the State's maintenance of mouflon sheep in the same area, claimed to

be a like threat to the Palila because of its consumption of the same seedlings and sprouts. *Palila v. Hawaii Dept. of Land & Natural Resources*, 649 F.Supp. 1070 (D. Haw. 1986) ("*Palila II*"). In this instance, the district court expressly addressed the current "harm" regulation and concluded (649 F.Supp. at 1075):

> A finding of "harm" does not require death to individual members of the species; nor does it require a finding that habitat degradation is presently driving the species further toward extinction. Habitat destruction that prevents the recovery of the species by affecting essential behavioral patterns causes actual injury to the species and effects a taking under section 9 of the Act.

Applying this standard, the court went on to find that the presence of the mouflon sheep constituted a "taking" because that presence "threatens the *continued existence* and the *recovery* of the Palila species." 649 F.Supp. at 1080, 1982 (emphasis added).

On appeal, it is fair to say, the United States disowned the "threat to recovery" ground of the decision, but it endorsed the result on the first basis. 852 F.2d 1106, 1107, 1108 n.4 (9th Cir. 1988); Pet. 21-22 n.20. The Solicitor General does not tell us whether the Service adheres to that fine line today. At all events, however, it should be stressed that while affirming on the "survival" ground alone (852 F.2d at 1107, 1110), the appellate court concluded that a "taking" had occurred on a mere finding that the continued presence of the mouflon sheep "*could* result in extinction" of the endangered species. 852 F.2d at 1107, 1110 (emphasis added).

The *Palila* cases do not stand alone. Thus, in *Sierra Club v. Lyng*, 694 F.Supp. 1260 (E.D. Tex. 1988), aff'd *sub nom. Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991), a "taking" in violation of Section 9 was found on the basis of

tree harvesting operations that primarily interfered with the *breeding* of an endangered species of woodpecker. See 694 F.Supp. at 1271-1272. And the court expressly endorsed the broad interpretation of the "harm" regulation articulated by the district court in *Palila II*, quoted a moment ago (*supra*, p. 12). 694 F. Supp. at 1270. In affirming, the court of appeals likewise looked to adverse effects on the woodpecker *population*, not the killing or injuring of any particular bird. 926 F.2d at 438-439.

The same view has been stated, albeit in dicta, in the Eighth Circuit and re-affirmed in the Ninth. *Defenders of Wildlife v. Administrator, EPA*, 882 F.2d 1294, 1300-1301 (8th Cir. 1989); *Pyramid Lake Paiute Tribe v. U.S. Dept. of Navy*, 898 F.2d 1410, 1419-1420 (9th Cir. 1990); *National Wildlife Fed'n v. Burlington N.R.R.*, 23 F.3d 1508, 1512-1513 (9th Cir. 1994).

The pattern continues to the present day. While invalidating it as unauthorized, the court below read the Service's "harm" regulation in the same way. Pet. App. 6a, 25a-26a, 68a, 69a, 70a-71a. And only last month, a federal district court in California pointedly declined to follow the District of Columbia Circuit in the present case and adhered to the Ninth Circuit decision in *Palila II*. *Marbled Murrelet v. Pacific Lumber Co.*, No. C-93-1400-LCB, slip op. 2 n.2 (N.D. Cal. Feb. 27, 1995). Again, the primary basis for concluding that a "taking" had occurred was that logging operations interfered with the breeding habits of the endangered bird — not a showing that any living bird had been killed or injured by the company's activities. Slip op. 55-57, 59.

5. It will be noticed that none of the cases just cited was initiated by the United States. But they are endorsed by the Solicitor General on behalf of the Secretary of the Interior and there is no reason to doubt that the Fish and Wildlife Service approves their reasoning. On the contrary, a careful

parsing of the "harm" regulation, although at first blush restrictive, admits of the broad reading the courts have given it. Having left the wording unchanged since 1981 with full knowledge of the judicial implementation, the Service must be deemed to have endorsed it. And, of course — as the Government itself emphasizes (Pet. 23-24) — the practical impact of the regulation far exceeds the few prosecutions actually initiated.

Our submission is that this "huge definition" (to borrow Judge Sentelle's phrase, Pet. App. 69a) cannot be fitted within the narrow confines of Section 9 of the Endangered Species Act. Nor do we believe the Service properly can invoke the questionable doctrine of "implied legislative ratification" after misleadingly announcing its seemingly innocuous new regulation as having a very restricted scope consistent with the Associate Solicitor's opinion.

B. The Practical Consequences of the Regulation

1. It requires no elaborate analysis to appreciate that the Fish and Wildlife Service's "harm" regulation exposes all those who engage in any kind of commercial activity on land or water to the constant risk of civil or criminal penalties, or injunction at the suit of concerned citizens or federal officers. See § 11, 16 U.S.C. § 1540. Given the number of listed species — including mammals, reptiles, amphibians, birds, fish, crustaceans, and insects (see 50 C.F.R. § 17.11) — there are very few areas where it is safe to assume no protected animal may be present, if only momentarily. And if disturbance of habitat counts as a "taking," provided only the future of the protected population is thereby adversely affected, any substantial land operation is likely to run afoul Section 9 of the Act.

2. This reality drives many to seek a so-called "incidental take" permit under Section 10. 16 U.S.C. § 1539. But such permits are not free. The Fish and Wildlife Service will

require the submission of a "conservation plan," to which the Service may add "such other measures" and "such terms and conditions," including "reporting requirements," as it deems appropriate. § 10(a)(2)(A) and (B), 16 U.S.C. § 1539(a)(2)(A) and (B); 50 C.F.R. § 17.22, 402.14(g), (i) and (j). In practice, the burdens imposed on an applicant today are often extremely onerous, typically including the setting aside of substantial "conservation" areas and a radical curtailment of activities. See Pet. 23-24 and n.22. Sometimes, indeed, the conditions of the permit are so pervasive as to render the operation uneconomic.

3. In light of the onerous "mitigation" measures typically exacted as the condition of an "incidental take" permit, the costs and delays of the process, and the continuing reporting obligations afterwards, some operators might well conclude that they would forgo applying for a permit, exercise caution and take their chances. But many operators will have no such choice.

Any activity conducted under license or permit from a federal agency, such as the Army Corps of Engineers or the EPA, is subject to be conditioned in the same way, even though it has been determined that the activity will *not* jeopardize the continued existence of any endangered species or adversely affect its critical habitat. § 7(b)(4), 16 U.S.C. § 1536(b)(4). Thus, willy-nilly, federally licensed operators may have an "incidental take" permit, with all its burdensome obligations, thrust upon them. Although we question its legitimacy, the practice (at least in some areas) is that such involuntary "permits" are regularly imposed.

This only arises, however, if the "incidental taking" of an endangered species is anticipated. *National Wildlife Federation v. National Park Serv.*, 669 F.Supp. 384, 389-390 (D. Wyo. 1987). Once again, then, the bite of this unusually harsh provision turns on the scope of the "taking" prohibi-

tion in Section 9. Under the Service's current "harm" regulation, it will come into play very often — presumably whenever a protected species is thought to be within the activity perimeters. See 50 C.F.R § 402.12(d)(2). This is far more often, one may surmise, than Congress ever contemplated.

C. The Limited Intent of Congress

At this point, some may be tempted to exclaim: "So what! The Fish and Wildlife Service ought not be condemned for its initial twists and turns or its lack of total candor, but, on the contrary, congratulated for ultimately writing a broad regulation and following an 'incidental take' practice that reaches the *real* problem, habitat destruction, and thus advancing Congress' general goal to preserve and restore endangered species of wildlife." This, however, ignores that the Endangered Species Act is not a mere declaration of objectives, leaving all questions of implementation to an appointed agency. To be sure, some matters *are* left to the administrators, such as the listing of endangered and threatened species, albeit, even then, specific statutory criteria are laid down. § 4, 16 U.S.C. § 1533. But the Act itself contains a very detailed prescription as to how the general goal is to be achieved and specifies *how far* public and private activities potentially disturbing endangered wildlife will be required to yield in the interest of conservation. In sum, Congress, responsive to conflicting pressures, made hard choices which unelected bureaucrats are not free to override.

1. On the particular score of habitat destruction, the Congress of 1973 very clearly did not enjoin all activities on private land that contains protected wildlife, and likewise eschewed any scheme under which a federal agency would enjoy such unrestricted injunctive power. Instead, the Endangered Species Act dealt with that matter by providing for

land acquisition to create conservation areas. § 5, 16 U.S.C. § 1534.

A second tool designed to deal with habitat destruction was provided by Congress in 1978 with the addition of provisions authorizing the designation of "critical habitat." §§ 4(a)(3), 4(b)(2), 16 U.S.C. §§ 1533(a)(3), 1533(b)(2). The designation process was refined by the 1982 amendments.

The very restricted scope of these provisions must be stressed. First, not every area used by a protected species may be included; only "critical" habitat is eligible for designation. § 3(5), 16 U.S.C. § 1532(5). Second, before making any such designation, the Service must "tak[e] into consideration the economic impact, and any other impact, of specifying any particular areas as critical habitat," and determine whether "the benefits of . . . exclusion outweigh the benefits" of inclusion. § 4(b)(2), 16 U.S.C. § 1533(b)(2). Third, any critical habitat designation must be published and may be challenged at a public hearing. § 4(b)(5), 16 U.S.C. § 1533(b)(5). And, most important, designation of critical habitat only affects federal agencies and their permittees § 7(a)(2), 16 U.S.C. § 1536(a)(2), not the general public.

Needless to say, this carefully balanced program is thrown overboard under the Service's "harm" regulation which, as we have seen, effectively withdraws *all* occupied habitat from disruptive activities by *any* private operator. This is not mere theory: in actual practice, the Service has largely ignored the Congressional mandate to designate "critical habitat" contemporaneously with the listing of a protected species, avoiding the difficult process of weighing competing concerns and relying, instead, on its pervasive "harm" regulation. It is not conceivable that Congress meant to allow its measured solution to be overruled in this way.

2. Nor is this all. When dealing with operators *other* than the federal agencies or their permittees, the Endangered Species Act is equally clear as to the acts prohibited. So far as relevant here, Section 9 — the only provision which addresses wholly private actors — proscribes the "tak[ing]" of protected fish or wildlife. § 9(a)(1)(b), 16 U.S.C. § 1538(a)(1)(b). If that term had been left undefined, it would be impossible to stretch it to embrace habitat degradation, whatever the consequences. But, it is equally implausible that Congress meant to delegate broad defining power to the Service when it took the trouble itself to define "take." § 3(19), 16 U.S.C. § 1532(19). Nor is it credible that the Service was left free to select one of those statutory terms, "harm," and expand it to absorb all the others; and to do so in a way that is wholly at odds with the "active" voice of all the defining verbs listed by Congress as varieties of "taking."

In sum, as the legislative history indicates, Section 9 — and, specifically, the prohibition on "taking" protected wildlife — is aimed at "those who would capture or kill [protected species] for pleasure or profit." 119 Cong.Rec. 30162 (Sept. 18, 1973). Congress itself having deleted habitat modification from the definition of "take" (see Pet. App. 9a-10a), the Service of course could not re-introduce such a provision. As we have seen, recognizing the obstacle, the Service has sought to accomplish the same end through a deceptive regulation. But unauthorized rewriting of a statute is no more permissible when done surreptitiously than when done openly.

3. With respect to the alleged "implied legislative ratification" of the "harm" regulation in 1982, we have already commented that, given the pretty dress in which the Fish and Wildlife Service wrapped its blunt instrument, Congress may not have understood what it was seeing. Pp. 8-9, *supra*.

For the rest, we cannot improve on Judge Williams's treatment. See Pet. App. 10a-24a.

One further point should be made in response to the Government's reliance on the 1982 amendment which added the "incidental take" provisions in Section 7 (16 U.S.C. § 1536(b)(4)) and Section 10 (16 U.S.C. § 1539(a)(1)(B) and (2)). It is not clear how far Congress meant to authorize the Service to propose habitat protection measures as part of the agency "consultation" process under Section 7 or to impose them as a condition of an "incidental take" permit under Section 10. See p. 15, *supra*. But, the Government's submission notwithstanding (Pet. Br. 35-36, 38-40), there is certainly no basis for reading these amendments as expanding the "taking" prohibition in Section 9, or as confirming an expansive reading of that prohibition, to reach any habitat modification that adversely affects a protected population. Indeed, the insertion of these provisions cuts in the opposite direction.

In return for immunity in respect of any "incidental" taking, the new provisions presumably authorize the imposition of habitat protection measures that Section 9 did not already mandate. Merely exacting an undertaking not to commit a crime under existing law would make little sense; the idea was to empower those administering the statute to impose *additional* conditions, directed to minimizing the *risk* that the incidental taking of a protected species would occur or, more generally, to mitigating any adverse impact on the population as a whole. This could have been achieved by rewriting Section 9 itself to embrace habitat modification that adversely affected the endangered population, or that entailed a risk of harm to an individual animal. But Section 9 was *not* amended. Instead, the more pervasive prohibition was authorized *only as to federal permitees* — whether those obtaining an "incidental take" permit from the Fish and Wildlife Service or those operating under a

permit issued by another federal agency (such as the Corps of Engineers). Thus, unless they are to be treated as superfluous, the 1982 amendments indicate that a "taking" — whether or not "incidental" — was not deemed to include indirect "injury" to a population through habitat degradation.

We conclude that the "harm" regulation so grossly oversteps the boundaries set by Congress in the Endangered Species Act that it cannot be saved by invoking the principle of judicial deference to administrative construction, nor by resort to the elusive doctrine of implied legislative ratification.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted.

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No. 94-859

In the
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October Term, 1994

Bruce Babbitt, Secretary of the Interior, *et al.*,
Petitioners,

v.

Sweet Home Chapter of Communities for a Great Oregon, *et al.*,
Respondents.

On Writ of Certiorari to the United States
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BRIEF OF THE DAVIS MOUNTAINS TRANS-PECOS HERITAGE ASSOCIATION, HILL COUNTRY HERITAGE ASSOCIATION, NATIONAL WILDERNESS INSTITUTE, TEXAS FARM CREDIT PROPERTY RIGHTS FOUNDATION, TEXAS WILDLIFE ASSOCIATION, TRANS TEXAS HERITAGE ASSOCIATION, and DEFENDERS OF PROPERTY RIGHTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the definition of "harm" under regulations implementing the Endangered Species Act of 1973 must be construed in a manner consistent with the Fifth Amendment mandate that private property be protected?

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Pursuant to Rule 37.3 of the Rules of this Court, the *amici* submit this brief in support of the Respondents. The *amici* support affirmance of the decision below. Consent to the filing of this brief has been granted by counsel for the Respondents and counsel for the Petitioners, and has been lodged with the Clerk of this Court.

IDENTITY AND INTERESTS OF *AMICI CURIAE*

The **Davis Mountains Trans-Pecos Heritage Association** is an association of Texas citizens formed in response to the abridgment of private property rights taking place in the Davis Mountains & Trans-Pecos areas. The Association supports private property rights protection through research, public education and other activities. Its mission embraces conservation of natural resources in conjunction with respect for private property rights, which underlie all other individual liberties.

The **Hill Country Landowner's Coalition (HCLC) (Georgetown, TX)** was formed in 1991 to oppose a local endangered species preservation plan to regulate private land use and to purchase a 30,000-acre wildlife refuge with tax-payer funds. The coalition is committed to the principle that when the rights of the individual are threatened — as they are when the government is allowed to render privately-owned land useless in order to protect an endangered or threatened species without paying any compensation whatsoever to the owner of that land — the whole fabric of American society is jeopardized.

The **National Wilderness Institute (NWI), (Washington, DC)** is a national public interest group dedicated to the wise management of natural resources, unique and special wildlife habitat, and wetlands. NWI embraces the perspective that renewable resources such as air, water, soil, wildlife, fish, forest, and range are dynamic, resilient, and respond posi-

tively to wise management. NWI stresses the need for a private sector stewardship that enhances the resource base without unnecessarily inhibiting economic growth. NWI encourages environmentally sound, site- and situation-specific practices that harness the dynamic and creative forces of the private sector — including protection of private property rights — and that reduce the regulatory burden of the federal government. NWI has spent a significant amount of its resources on the study and analysis of the impact of the Endangered Species Act on private property.

The **Texas Farm Credit Property Rights Foundation (Austin, TX)** is a non-profit educational and research organization formed to further the efforts of protection of property rights through litigation and legislation. Its efforts are concentrated on promoting coordination and communication among property rights groups to find common goals and strategies to preserve the Fifth Amendment guarantees as intended by the Founding Fathers. It is dedicated to the principle that private property rights not be trampled by confiscatory government regulation.

The **Texas Wildlife Association (TWA) (San Antonio, TX)** was formed in 1985 to serve as an advocate for the benefit of wildlife and for the rights of wildlife managers, landowners, and hunters in educational, scientific, political, regulatory, legislative, and legal arenas. The Texas Wildlife Association is a non-profit organization whose membership controls (either through ownership or leasing or consulting obligations) millions of acres of wildlife habitat in Texas. TWA

members are dedicated to the maintenance, management, and enhancement of wildlife habitat on private land. Its mission is to insure that wildlife, especially on private property, remains an enduring part of Texas.

The **Trans Texas Heritage Association (TTHA) (Alpine, TX)** is a statewide organization dedicated to the protection of landowner rights. Founded in 1991, its members collectively own over 15 million acres of land in Texas and other states. Members of TTHA believe that private property rights are the cornerstone of the freedoms and liberties protected by the Constitution, and environmental regulations and government land acquisitions often unreasonably limit the spectrum of private property ownership.

Defenders of Property Rights (Washington, DC) is the nation's only legal defense foundation devoted exclusively to protecting private property rights. It was founded in 1991 in recognition that property rights are today under siege by excessive government laws and regulations that often have the effect of rendering the Constitution a worthless scrap of paper. Its mission is to protect vigorously those rights considered essential by the framers of the Constitution, and to promote a better understanding of the integral relationship between private property rights and individual rights and liberty. Defenders engages in litigation across the county affecting the public interest and the private property rights of its membership to stem government incursion forbidden by the Bill of Rights. Defenders has devoted a significant portion of its resources to the issue of regulatory takings and

participated in both the *Lucas v. South Carolina Coastal Council* , 112 S. Ct. 2886 (1992), and *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994) cases when they were before this Court.

STATEMENT OF THE CASE

This case calls into question the interpretation by the United States Department of Interior of the "take" prohibitions under the Endangered Species Act of 1973 (ESA or Act) that apply to private property. The court below invalidated a broad regulatory definition of "take," finding that "significant habitat modification" does not constitute a prohibited "take" within the meaning of Section 9 of the ESA because a "take" must involve a "direct application of force against the animal taken." *Sweet Home Chapter v. Babbitt*, 17 F.3d 1463, 1465 (D.C. Cir. 1994).

SUMMARY OF ARGUMENT

The touchstone of regulatory takings analysis under the Fifth Amendment's just compensation clause is whether the regulation has "gone too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The ESA epitomizes a regulatory scheme that has, in fact, "gone too far." Enacted in an era marked by rapid growth and a shared sense that government resources were unlimited, the ESA reflects environmental zeal at its zenith. In *TVA v. Hill*, 437 U.S. 153 (1978) this Court stated that at the time the ESA became law Congress viewed conserving endangered species as the "the highest of

priorities," *Id.* at 174, and a goal to be attained "whatever the cost." *Id.* at 184. Passage of the ESA was fueled by a recognition that this nation had previously paid inadequate attention to the environment and the plight of many endangered species such as the American bald eagle and grizzly bear.

But today, at the close of the Act's second decade, complex and extensive environmental laws are in place at every level of government. Today, we not only recognize that our resources are insufficient to protect all 1,200 species, subspecies, and vertebrate populations listed as endangered or threatened under the Act, but we now have in place the most complex and comprehensive environmental regulatory scheme on the planet. As a result, virtually every conceivable aspect of private property use and ownership is governed by one or more environmental laws.

Ironically, after more than two decades of intensive enforcement of the ESA — made possible by the broadest interpretation of regulatory authority such as the agency interpretation at issue in this case — it has become clear that the ESA has failed to fulfill its promise of recovering endangered species from extinction. *See generally* Dixy Lee Ray, *Environmental Overkill* (1993). Rather, harsh and rigid regulations which take no account of economic or social needs have fostered a backlash against government by those private property owners unfortunate enough to have such species located on their land. The backlash against the ESA has fueled a property rights movement the likes of which have not been seen in this country since the 1960's when

black Americans marched on Washington in protest of the violation of their civil rights by a government that had all but forgotten its duty to uphold the constitutional rights of all of its citizens.

As a result, in large part over the public dissatisfaction with the impact of the ESA on private property rights, the House of Representatives recently passed the "Private Property Rights Protection Act of 1995" (H.R. 925). This bill requires government to compensate property owners when the value of private property has been diminished by twenty percent or more due to operation of the ESA or Section 404 of the Clean Water Act ("wetlands"). Representative Greg Laughlin (D-TX) recently explained why he supported passage of H.R. 925: "With the implementation of the Endangered Species Act and Clean Water Act provisions, property rights have been progressively eroding. . . . While many lawmakers and administrators have sat in Washington passing down these regulations to our citizens, I have been where the true effect of these regulations is felt on our farms and ranches. I have talked with the people who have lost the right to maintain their land because a government official saw fit to regulate it." *Laughlin Champions Private Property Rights with Amendments in the House*, Dripping Springs Dispatch, March 9, 1995, at 3.

Senator Mark Hatfield, one of the authors of the ESA, recently admitted that there are problems with agency implementation of the Act: "There is no question that the act is being applied in a manner far beyond what any of us envi-

sioned when we wrote it twenty years ago . . . But today that act is being applied across entire states and regions, with the result that it now affects millions upon millions of acres of publicly and privately owned land, and many thousands of human beings . . . . The situation has gotten out of control." Mark O. Hatfield, *Can't See the Forests for the Endangered Species*, Washington Post, June 12, 1992, at A23.

Despite clear congressional concern with the impact of the ESA, the agencies charged with implementing the Act continue to expand its coverage. Indeed, just last year the U.S. Fish and Wildlife Service proposed to set aside all or parts of thirty-three Texas counties — or 2.5 million acres — as critical habitat for the golden-cheeked warbler. Consuming twelve percent of the state of Texas, this designation would have constituted the largest block of land ever designated under the Act. Public outcry over the proposal, however, forced the agency to put its plan on hold.

Much of the backlash against the ESA rests upon the regulatory interpretation at issue in this case. The ESA defines "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

Within the definition of "take," the term "harm" has been broadly construed in regulations promulgated by the Secretary of the Interior to include "significant environmental modification or degradation" such that the activity "significantly impair[s] essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. 17.3.

This extremely broad definition of "harm" under the ESA regulations has resulted in the withdrawal of millions of acres of land from productive use across the nation without payment of any compensation to the landowners for their loss. Such regulatory taking without compensation to the landowner is a clear violation of the just compensation clause of the Fifth Amendment. The decision below, which provides a more narrowly tailored interpretation of the agency's authority to regulate and in turn, to affect private property rights, should therefore be upheld by this Court as being more consistent with the Fifth Amendment mandate that private property rights be protected.

ARGUMENT

I. THE BROAD DEFINITION OF "HARM" TO INCLUDE ANY HABITAT MODIFICATION HAS LED TO WHOLESALE DESTRUCTION OF PRIVATE PROPERTY RIGHTS.

Because of the broad regulatory definition of "harm" to include the modification of habitat as a prohibited "take" under the ESA, the use of private property can be seriously curtailed even if an actual endangered species does not, in fact, live on the regulated property. As a result, millions of acres of private property in this country are now being regulated under the guise of "protecting" endangered species and

prohibiting heretofore common uses of that property. (See map of areas of land identified as habitat of endangered species — Appendix A.) To follow are some typcial examples of how such a broad regulatory definition of "harm" can affect private property owners:

• Brandt Child planned to build a campground and golf course on his property in Three Lakes, Utah, in an area long used for recreation. The project, however, was brought to a halt when the United States Fish and Wildlife Service (U.S. FWS) declared a pond on Child's property to be prime habitat for the endangered Kanab ambersnail. U.S. FWS fenced off the pond and prohibited all recreation and work in the area, at an estimated loss of $2.5 million. Child was also made responsible for reporting any change in status on the property, so when a flock of domestic geese took up residence on the pond, he informed U.S. FWS. He was thereupon informed that if the geese ate any snails, he could face a $50,000 fine for each snail "taken."

The U.S. FWS then requested the Utah Department of Wildlife and Resources to send someone to shoot the geese to determine how many snails had been eaten. But when officials arrived and saw reporters and photographers they decided not to shoot the geese, deciding instead that because the geese were domestic animals and not wildlife, they did not have jurisdiction. Although denied by U.S. FWS, according to a newspaper reporter and local residents, U.S. FWS devised a new strategy. By inducing vomiting in the geese, the Service could get the evidence it wanted. When eventu-

ally analyzed, the vomit contained no snails. Today the geese are living elsewhere, and the snail population thrives in the pond; Mr. Child cannot develop his property, but he has never been compensated for that loss.

• Mr. and Mrs. Davidson worked for nine years in order to have enough money to obtain a down-payment for a construction loan for a home to be built on 1.45 acres near Austin, Texas. The bank told them that in order to finance the construction they would need a "bird letter" from the U.S. FWS because golden-cheeked warblers had been spotted near their land. After obtaining reports from two different biologists — at their own expense — the Davidsons established that not only were no birds present on their property, but that it was not suitable habitat for the golden-cheeked warbler. Nevertheless, the U.S. FWS disagreed and refused to give them permission to use their land unless they could meet the cost-prohibitive requirements of obtaining a Section 10(a) permit. Margaret Rector is another victim of regulatory overkill in Texas who was likewise unable to afford approval from the U.S. FWS to use her land, even though no golden-cheeked warblers were actually found there either. In 1991 her property was worth $1.3 million; after being designated critical habitat for the golden-cheeked warbler, it is now worth $29,300. No compensation has been paid to Ms. Rector or Mr. and Mrs. Davidson for the taking of their property.

• Ben Cone, a North Carolina timber land owner, always tried to harvest trees in a way that provided habitat for wild-

life. Campers, hunters and fishermen are all granted permission to use his land because he believes wildlife, tree farming and outdoor recreation are compatible. But when the endangered red-cockaded woodpecker arrived on his property, the ESA put 1,000 acres of his land off limits to him. He has already spent $8,000 on surveys by biologists to make sure he is following the stringent rules, and now estimates that he has lost $1.8 million in timber sales. To protect his remaining land from being occupied by the bird and consequently falling under federal land control, Cone had no choice but to change his timber management practices to try to harvest the pines before they become old enough to attract woodpeckers and prevent him from using the rest of his land.

• Those who live in California's 77,000-acre Stephens kangaroo rat study area found out in October of 1993 how inflexible federal enforcement of the ESA can be. As wildfires swept through California, charring 25,000 acres and destroying 29 homes, homeowners like Yshmael Garcia were warned not to clear firebreaks around their homes. "My home was destroyed by a bunch of bureaucrats in suits and so-called environmentalists who say animals are more important than people," said Garcia. " The only way to protect against fire is build a firebreak, and we weren't allowed to do that [by U.S. FWS]."

• In February 1993, the Sierra Club won a suit to force the U.S. FWS to develop a recovery plan and regulate the pumpage of water from the Edwards Aquifer. This pumpage is used by the City of San Antonio and surrounding agricul-

tural communities. An adequate flow to San Marcos Springs, one of the two primary "spill points" of the aquifer, is believed to be essential for the survival of the endangered San Marcos Salamander. The aquifer is, however, the sole water source for 1.5 million people in a five-county area. In response to the judgment by Federal Judge Lucius Bunton, the Texas State Legislature passed new laws to force severe pumping limitations for users of the aquifer. Although the law has not yet been implemented, it is estimated that costs to replace the 'lost' water could reach $7 billion over 20 years.

• When Taung Ming-Lin, a Chinese immigrant, bought land in Kern County, California, he planned to grow bamboo sprouts and other Chinese vegetables for sale to southern California's Asian community. Lin said he had been told by county officials that the land was zoned for farming and no permit was needed. But those officials confiscated his tractor and disc and charged him with federal civil and criminal ESA violations because his tractor allegedly disturbed the habitat of the endangered Tipton kangaroo rat. The criminal charge carries penalties of up to a year in jail and a $100,000 fine. Other farms in the San Jaoquin Valley have also been recently targeted by ESA enforcers. A nearby farmer who irrigates with waste water from the city of Bakersfield has been charged with twelve counts of disturbing endangered species habitat and faces a possible penalty of $300,000. A Bakersfield spokesman said, "We have to have somewhere to spread the water. This situation could have disastrous consequences for the city." The affected farmer was reportedly told

by U.S. FWS agents he could resume operations on the land if he would give the state 640 acres of his land and $300,000. In Fresno, California, Tule Vista Farms agreed to pay a $5,000 fine, give sixty acres and sell an additional 100 acres to U.S. FWS to settle a case involving plowing land believed to be habitat for the endangered blunt-nosed leopard lizard.

• In June 1991, about 250 Florida landowners received a letter from U.S. FWS about the Florida scrub jay. The recipients were warned that "any activity that destroys scrub occupied by scrub jays may violate the Act." Such a violation can result in up to a year in jail and fines of $25,000 (civil) or $50,000 (criminal) per incident. The letter goes on to state that "although this may appear to be a burden, there is a procedure to resolve this conflict." Then the letter mentions Habitat Conservation Plans (HCP's) or Section 7 "take" permits. HCP's are extremely expensive and Section 7 permits—applied only under federally funded projects—provide no recourse for the property owner desiring to clear scrub brush from a backyard. Although prohibited from any type of property modification or use, the property owner is still responsible for any property taxes.

• For a decade, Richard Schroeder of Gearhardt, Oregon worked to develop a resort and golf course, only to discover that the development site was occupied by the Oregon silver spot butterfly. Undeterred, Mr. Shroeder hired the world's leading expert on the butterfly to develop a habitat conservation plan that would allow the development to proceed. Despite Schroeder's earnest efforts, the costly and cumber-

some regulatory process and the discovery of additional butterflies in another area of the development forced even his most committed investors to back out, forcing the cancellation of the project. Ironically, development of the property would have been in the interest of the butterfly whose habitat requirements include a violet that only grows in cleared areas.

The legislative history of the ESA gives little indication that the Act would impose significant costs on landowners. Nevertheless, expanding the definition of "harm" to include habitat modification has foisted a costly burden on private landowners. *See generally* Robert E. Gordon, Jr. and James R. Streeter, *Endangered Species Cost Identifiable in Recovery Plans and Other Findings*, 331 Tech. J. Franklin Inst. 244 (1994). A recent study of 306 recovery plans covering 388 listed species reveals an alarmingly frequent rate of potential conflicts between species protection and common, beneficial land uses. According to that study, protection of one third of the listed species conflicts with normal activities such as outdoor recreation, agriculture and grazing. In addition, at least 236 recovery plans call for law enforcement actions by U.S. FWS *Id.*

Concern about the growing costs, conflict and ineffectiveness of relying completely on a regulatory and punitive approach to protecting endangered species led Congress to amend the ESA in 1982 to authorize "habitat conservation plans" (HCP's). The theory was that landowners and government would cooperatively develop plans to protect sufficient

habitat for listed species and allow other use to be made of the rest of the property. Despite strong pressure to make HCP's work, several problems with HCP's have become apparent during the last ten years. Using HCP's turned out to be so expensive and complex a process that only very large parties with great resources could participate. Despite statements by Secretary Babbitt that a recent change in policy means landowners who enter into HCP's will be given greater certainty, other provisions of the Act contradict these assurances. An HCP cannot shield a participant from further burdens if a species not provided for in the plan is later listed or if the plan is not "properly functioning," or if "extraordinary circumstances" occur, or if an environmental group brings suit to make the plan more onerous. *Id.*

Since HCP's have such a disappointing track record, ecosystem management has become the latest term used to hold out the promise that the Act can be administered in a more reasonable and less burdensome way. The argument goes that, by protecting ecosystems, large numbers of species will be protected and the need to list them as endangered avoided. Critics point out, however, that an ecosystem protection approach provides no safeguards or discernible limits on federal authority. The term "ecosystem" is used to describe an interacting collection of organisms and their environment. There is no definitive pattern of ecosystems on the landscape awaiting discovery through the application of science. There is, instead, a limitless number of ecosystems with legitimate, different ways of mapping them. A puddle

can be delineated as the ecosystem of a freshwater flea, while an entire watershed—or more—could be seen as the ecosystem of a different species. As a consequence, a given tract of land could appear on scores of different maps and be criss-crossed by diverse ecosystem boundaries. Dr. Allan Fitzsimmon, a former top federal land use expert at the National Park Service, has warned, "Ecosystem planning could expose landowners and users to a Pandora's box of unpredictable and capricious restrictions." *Id.*

II. THE REGULATORY DEFINITION OF "HARM" MUST BE CONSTRUED IN A MANNER CONSISTENT WITH THE FIFTH AMENDMENT MANDATE THAT THE OWNER OF PRIVATE PROPERTY TAKEN FOR PUBLIC USE BE COMPENSATED.

According to Secretary of the Interior Bruce Babbitt, "The Endangered Species Act is an extraordinary piece of legislation because it allows the Federal Government to preserve, maintain, and foster the recovery of endangered species wherever they occur, without regard to geography, location, or land ownership." *National Biological Survey: Hearings before the Joint House Comm.*, 103rd Cong., 2d Sess. (1993). Due in large part to the broad definition of "harm" as including modification of a species' habitat, coupled with the severe civil and criminal sanctions for any violations of the Act, many reasonable and productive uses of

private property are being substantially curtailed or terminated altogether by the Act. For example, in order to avoid habitat modification which could "harm" a species protected under the Act, landowners have been prohibited from crossing dry creeks in vehicles, cutting trees, clearing brush, using pesticides, planting crops, building homes, grazing livestock, and protecting livestock from predators. In that way, the Act has in many instances deprived landowners of the only economic uses they can make of their properties — uses which are productive and which contribute to local, regional, and national economies and welfare.

Such cavalier destruction of property rights is in clear derogation of the constitutional mandate that "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. Indeed, it is doubtful that the regulatory excesses currently occurring under the ESA would be possible if the government were in fact complying with its constitutional duty to pay for the private property that it takes.

The right to use land is protected by the Fifth Amendment's due process and takings clauses. This Court has explicitly held that the property rights protected by the Fifth Amendment to the Constitution include the rights "to possess, use and dispose" of private property. *Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982); *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). Ranching, farming and building fences and houses are common and historic uses of private property

which cannot be infringed or destroyed by government with impunity. "The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition..." *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2901 (1992). *See also Dolan v. City of Tigard*, 112 S. Ct. 2309 (1994). Yet the agency definition of "harm" at issue in this case often allows the government to do just that by depriving individuals of the right to make normal and common uses of their land, without just compensation.

This Court has left no doubt that regulatory schemes, no matter how laudable, which result in the taking of private property must be compensated. As Justice Oliver Wendell Holmes warned back in 1922: "[W]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

Finally, the notion that the federal government is not in any manner restrained by the Fifth Amendment, and that property owners must sue for compensation for their loss after the fact, rings hollow in this era when the federal government in its zeal to do good, has engaged in the wholesale destruction of property rights. At some point, the Fifth Amendment must mean that government should take into account the property rights of its citizens before it destroys their lives and livelihoods. Requiring private individuals who have been singled out to bear the brunt of federal regula-

tion to then turn around and litigate against the might of the federal government in order to activate their constitutional guarantee — which takes years, indeed decades and hundreds of thousands of dollars to purse — simply does not satisfy the framers' clear intent that property rights be vigorously protected. As Justice William Brennan asked in his dissent in *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 661, n.26 (1981). "After all, if a policeman must know the Constitution, then why not a planner?" Why then not the U.S. FWS?

CONCLUSION

Judge Jay Plager of the United States Court of Federal Claims recently stated: "Courts should leave no doubt as to whose side the law stands upon. . ." Hendler v. United States, 952 F.2d 1364, 1375 (Fed. Cir. 1991) By upholding the decision of the court below, this Court can make it clear that it stands behind the constitutional duty of government to protect private property rights.

For all of the foregoing reasons, we urge this Court to uphold the decision below.

Respectfully submitted,

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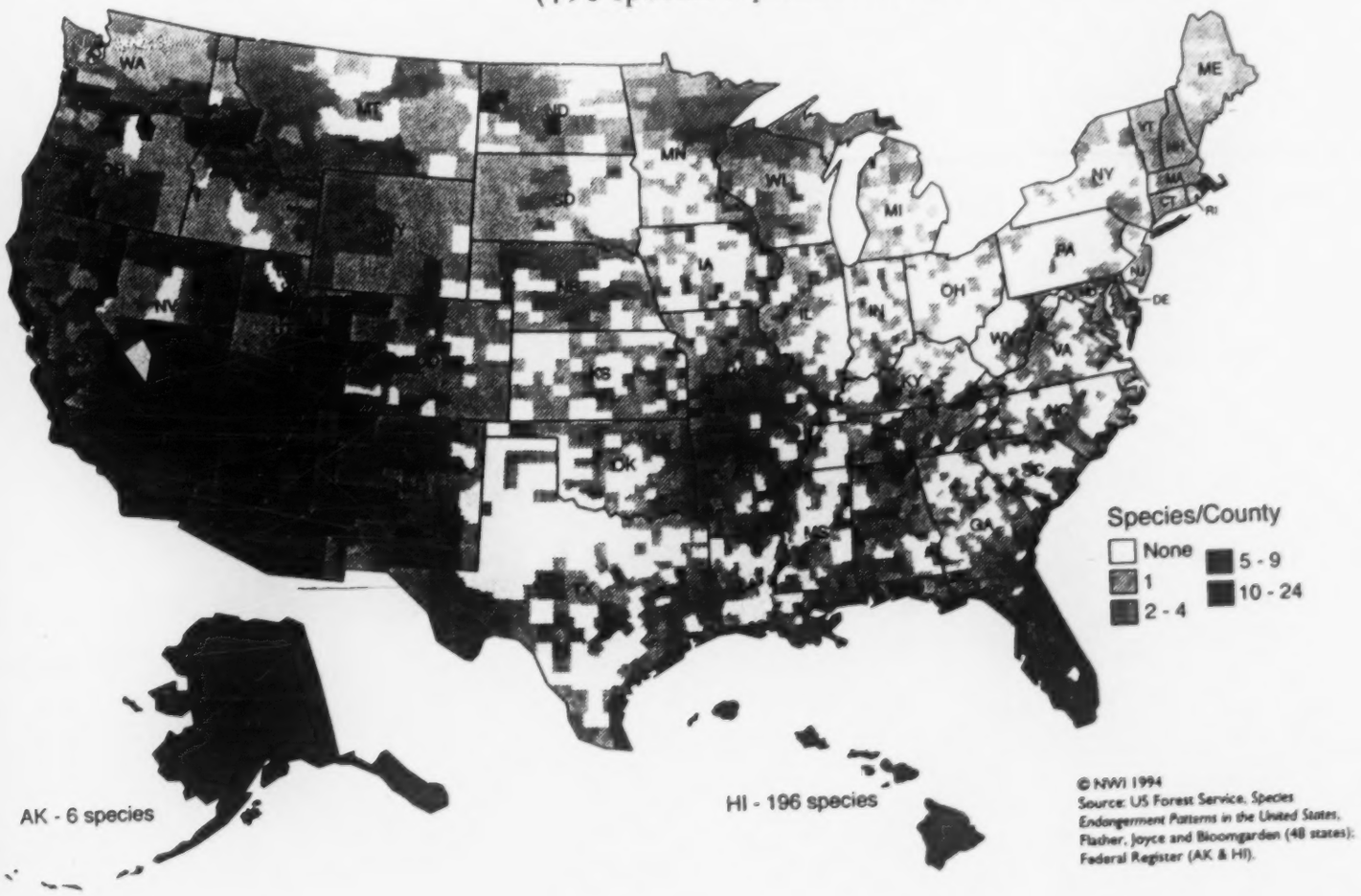
March 23, 1995

County by County Ranges of Endangered and Threatened Species

(790 species represented)



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Source: US Forest Service, *Species Endangerment Patterns in the United States*, Flather, Joyce and Bloomgarden (48 states); Federal Register (AK & HI).

(14)

No. 94-859

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

Petitioners,

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, ET AL.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF THE STATES OF CALIFORNIA, KANSAS, NEBRASKA AND UTAH IN SUPPORT OF AFFIRMANCE

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QUESTION PRESENTED

Whether the regulation at 50 C.F.R. section 17.3 which defines "harm" for purposes of section 9 of the Endangered Species Act is invalid to the extent that it includes as "harm" "significant habitat modification or degradation" that "actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."

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No. 94-859

THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.
Petitioners,

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, ET AL.
Respondent.

BRIEF AMICUS CURIAE OF THE STATES OF CALIFORNIA, NEBRASKA AND UTAH IN SUPPORT OF AFFIRMANCE

INTEREST OF AMICI STATES

Amici States have a vital interest in how the term "harm" in section 9 of the Endangered Species Act ("ESA"), 16 U.S.C. sections 1531-1544 is construed. The broad interpretation of "harm" urged by petitioners, the Secretary of the Interior et al., ("the Secretary") subjects ordinary land use activities on vast tracts of private land within Amici States to federal regulation under the "take" prohibition of the ESA. The scale of such ESA regulation is considerable, both in terms of the amount of land affected and the economic impact. At last count, there were more than 400 animal species listed as endangered or threatened (hereinafter "listed" species) in the United States. *Endangered Species Technical Bulletin* 20, U.S. Dept. of the Interior (November/December 1994). Approximately 3,700 other candidate species await a listing

decision. *National Geographic*, "The Endangered Species Act" 9 (March 1995). According to the General Accounting Office ("GAO"), over ninety percent of all listed animal and plant species have habitat on nonfederal land. GAO, *Endangered Species Act: Information on Species Protection on Nonfederal Lands* ("*GAO Report*") 1 (Dec. 1994). Of the 359 animal species that were listed as of May 10, 1993 and that had some habitat on nonfederal land, more than two-thirds (247) had over sixty percent of their habitat on nonfederal lands, and more than a fifth (76) had all of their habitat on nonfederal land. *Id.* 5 (Table 1).

For example, in California, every county contains at least one listed species, and one third of all candidate species in the United States are found in California.[1/] Coastal sage scrub habitat for the listed California gnatcatcher encompasses roughly 3.8 million acres in Southern California. See 58 Fed.Reg. 65,090 (1993). Habitat occupied by the listed Stephens kangaroo rat in Riverside County, California totals almost 20,000 acres, and includes highly desirable and developable land worth $40,000-50,000 an acre.[2/] In Northern California, the Simpson Lumber Company's habitat conservation plan for the Northern Spotted Owl, which restricts the company's timber harvesting, covers 383,00 acres. See *GAO Report, supra,* 18. The Red-Cockaded Woodpecker Management Agreement between Georgia-Pacific Corporation and the U.S.Fish and Wildlife Service ("FWS"), which specifies land use practices that Georgia Pacific must follow to

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1. *Endangered Species Act Reauthorization - Woodland: Hearing before the Subcomm. on Environment and Natural Resources of the House Comm. on Merchant Marine and Fisheries*, 103d Cong., 1st Sess. 4 (1993); *Endangered Species Act - Incentives to Encourage Conservation by Private Landowners: Hearing before the Subcomm. on Environment and Natural Resources of the House Comm. on Merchant Marine and Fisheries*, 103d Cong., 1st Sess. 90 (1994).

2. See Beatley, Timothy, *Habitat Conservation Planning* 130, 144 (Univ. of Texas Press 1994).

avoid a "take" through habitat modification, affects 4 million acres in the southeastern United States.[3] While economists might debate the exact economic impacts of such habitat restrictions, no one can gainsay that the current expansive definition of "harm" costs the States millions of dollars in foregone economic development and tax revenue.

The States also rely on the productivity of state-owned lands to carry out vital functions. For example, State school lands provide essential revenue for educational purposes. Consequently, section 9 "harm" restrictions not only affect the private economy within States, but also directly affect the States' ability to utilize their own resources for public purposes.

State and local officials also have been threatened with prosecution or civil suit under section 9 if they approve private land use activities that purportedly violate the "harm" regulation.[4] Threatening or suing state

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3. See *Endangered Species Act: The Role of Habitat Conservation: Hearing before the Subcomm. on Environment and Natural Resources of the House Comm. on Merchant Marine and Fisheries*, 103d Cong., 1st Sess. 110 (1993).

4. See Thornton, R., *The Endangered Species Act: Searching for Consensus and Predictability: Habitat Conservation Planning Under the Endangered Species Act of 1973*, 21 Envtl. L. 605, 613-614 (1991) (quoting a FWS letter to the Planning Director of a California city stating, with respect to a zoning action, that "the approval and implementation of the proposed action may subject . . city officials to investigations by our law enforcement branch regarding potential violations of the Endangered Species Act."); Joint Appendix ("J.A.") 47 (Spotted Owl Guidelines indicating that state officials may be liable for a "take" by approving timber harvesting on private land); Gidari, Albert, *The Endangered Species Act: Impact of Section 9 on Private Landowners*, 24 Envtl. L. 419, 430-435 (1994) (describing FWS letters to the Washington Forest Practice Board). Environmental groups sued California state agencies on similar grounds. See *Marbled Murrelet v. Babbitt et al.*, C-93-1400 FMS, (U.S.D.C. N.D.Cal.) (complaint filed April 16, 1993) (Second claim for relief naming the California Board of Forestry and Department of Forestry as defendants, and alleging that state regulatory approval of a timber harvesting plan on

officials in this fashion for their regulatory decisions (rather than their activities as landowners) raises the specter of coerced state enforcement of federal ESA "take" restrictions, contrary to basic federalism principles in *New York v. United States*, 112 S.Ct. 2408 (1992).

Amici States are not hostile to the species protection objectives of the ESA. Many States have enacted their own endangered species legislation.[5/] Moreover, states like California have backed their species preservation goals with land acquisition programs to acquire needed wildlife habitat.[6/] Despite their commitment to species protection, Amici States believe that the Secretary's "harm" regulation exceeds his authority, and they respectfully submit this amicus brief in support of affirmance.

STATUTORY BACKGROUND

Section 9(a)(1)(B), 16 U.S.C. section 1538(a)(1)(B), and 50 C.F.R. section 17.31(a) make it unlawful for "any person" (which includes all private and public entities, see 16 U.S.C. section 1532(13)), to "take" a threatened or endangered species. "Take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect,

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private land constitutes a "take" through habitat modification).

5. See e.g., Cal. Fish and Game Code sections 2500 et seq.,; Colo. Rev. Stat. 33-2-101 et seq.; Conn. Gen Stat. 26-303 et seq.; Fla. Stat. 372.072 et seq.; Hawaii Rev. Stat. 195D-1 et seq.; 520 Ill. Comp. Stat. Ann. 10/1 et seq.; Burns Ind. Code Ann. 14-2-8.5-1(1) et seq; Kansas Stats. Ann. 32-957 et seq.; Mich. Comp. Laws 299.221 et seq.; Mont. Code Ann. 87-5-101 et seq.; Neb. Rev. Stat. 37-430 et seq.; N.J.Stat.23:2A-1 et seq.; N.M. Stat. Ann. 17-2-37 et seq.; 34 Pa.C.S.A. 2167; Ore. Rev. Stat. 496.172 et seq.; 10 Vermont S.A. 5401 et seq.

6. See California Wildlife and Natural Areas Conservation Act, Cal. Fish and Game Code sections 2700-2729; Keene-Nielsen Fisheries Restoration Act, Cal.Fish and Game Code sections 2760-2765; California Wildlife Protection Act of 1990, Cal.Fish and Game Code sections 2780-2799.6.

or to attempt to engage in any such conduct." Section 3(19), 16 U.S.C. section 1532(19). (Emphasis added.) The Secretary defines "harm" as follows:

> "*Harm* in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. section 17.3. (Emphasis added).

Knowing violations of the "harm" regulation are a crime punishable by up to one year in jail and substantial fines. See 16 U.S.C. 1540(b). Violators of the "harm" regulation may also face citizen suits for injunctive relief, as well as civil penalty actions by the federal government. See 16 U.S.C. sections 1540(a), (e)(6), (g)(1)(A).

In addition to the "take" prohibition in Section 9, the ESA protects endangered species in other ways. Section 7, the so-called interagency consultation provision, directs federal agencies to ensure that actions they authorize, fund, or carry out are "not likely to jeopardize the continued existence" of endangered or threatened species, and will not "result in the destruction or adverse modification" of critical habitat of such species. 16 U.S.C. 1536(a)(2). The FWS and National Marine Fisheries Service are authorized to designate critical habitat for endangered or threatened species within their respective jurisdictions. 16 U.S.C. section 1533(a)(3).

Section 5, 16 U.S.C. section 1534, also establishes a federal land acquisition program to acquire land for the benefit of endangered and threatened species.

In 1982, Congress amended the ESA to ameliorate the harshness of the "take" prohibition in section 9. Private parties whose lawful activities would otherwise result in an illegal "take" of a listed species were authorized to obtain an "incidental take permit" for such a "take." Section 10(a)(1)(B), 16 U.S.C. 1539(a)(1)(B).

To obtain an "incidental take" permit, a private party must submit a conservation plan which minimizes and mitigates the impacts of the incidental take. 16 U.S.C. 1539(a)(2)(A). Section 7 was also amended to allow for issuance of an "incidental take statement" as part of the interagency consultation process under section 7. Section 7(b)(4), 16 U.S.C. 1536(b)(4). Like the section 10 "incidental take permit" for private activities, the section 7 "incidental take statement" for federally-conducted or permitted activities authorizes "incidental takes" which might otherwise violate the section 9 "take" prohibition.

SUMMARY OF ARGUMENT

1. Amici States urge affirmance of the decision below, but by a slightly different argument than that of respondent or the court of appeal. In our view, the crux of this dispute is whether "harm" includes habitat modification activities that injure wildlife through indirect and attenuated patterns of causation. The court of appeals used the concept of the "direct application of force" to define the proper scope of "harm." Amici States believe, however, that the distinction between indirect vs. direct causation underlies the court of appeals' reasoning, and that defining the issue in these terms -- rather than the "direct application of force" or habitat modification *per se* -- aids in analysis of the matter.

For example, Amici States agree that crushing a listed species with a bulldozer while clearing land would be a prohibited "take." The fact that the killing occurred in the course of a habitat modification activity, i.e., land clearing, would not immunize it from the "take" prohibition. But that type of "killing" or "injury" -- involving direct causation between the acts of the perpetrator and the injury to the animal -- is not in issue.

Instead, the dispute is over indirect and attenuated

patterns of causation exemplified by the *Palila* decisions.[7] There, feral sheep and goats were eating the seedlings and shoots of mamane trees. The goats and sheep were not themselves harming the endangered palila birds. Nor did the palila eat the shoots and seedlings of mamane trees, so the animals were not in direct competition for food. Instead, the shoots and seedlings would eventually become full-grown trees in twenty or thirty years, and these trees and their leaves would then be used by the palila for nesting and food. The State of Hawaii was found to be "taking" the palila because it did not prevent feral goats and sheep from eating mamane tree shoots, which years later would grow into larger trees, which in turn would be used by the palila for nesting and food in the future. Our difference with the Secretary is in whether acts (or omissions) with this indirect *Palila*-like causation (rather than the direct causation of a bulldozer crushing an animal) constitute a section 9 "take."

2. Amici States agree with the Secretary that there is an overlap among the various terms making up the definition of "take" in 16 U.S.C. section 1532(19).[8] Since the Secretary's definition of "harm" includes an act that "actually kills" a species, the overlap with the other "take" term, "kill," is apparent. However, the Secretary tries to exploit the overlap by suggesting that it shows the reasonableness of the "harm" definition, and makes it difficult if not impossible for Sweet Home to show in a facial challenge that the "harm" definition is invalid in

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7. See *Palila v. Hawaii Dept. of Land & Natural Resources*, 471 F.Supp. 985 (D.Hawaii 1979) ("*Palila I*"), *aff'd*, 639 F.2d 495 (9th Cir. 1981) ("*Palila II*"); *Palila v. Hawaii Dept. of Land & Natural Resources*, 649 F.Supp. 1070 (D.Hawaii 1986) ("*Palila III*"), *aff'd*, 852 F.2d 1106 (9th Cir. 1988) ("*Palila IV*").

8. See Pet. Br. at 23, n. 11 ("There is no reasonable definition of "harm" that would not overlap with some of the other terms."); J.A. 68 (Final Redefinition of "Harm") ("it is obvious that there is considerable overlap in many of these terms and it would be a fruitless and impractical exercise to attempt to define any of these terms to the exclusion of the others so as to have no overlap of prohibited actions.").

every conceivable circumstance. Pet. Br. at 19, 21.

Unlike the Secretary, Amici States think that the Court should first factor out the overlap for jurisprudential reasons. Because "harm" overlaps with other "take" terms, and because none of those other terms are being challenged, the only actual controversy before the Court concerns those acts that are both within the "harm" definition and outside the scope of the other "take" terms. It would be bizarre to uphold the "harm" regulation on grounds that it properly includes certain acts or activities which everyone agrees constitute a "take" under other unchallenged terms in the "take" definition. Factoring out the overlap not only pinpoints the actual controversy, but it also highlights what, if anything, is distinctly unique about the "harm" definition. What is unique, and distinctly wrong with the "harm" definition is that it embraces within the "take" prohibition 1) habitat modification activities that 2) significantly impair essential animal behavioral patterns 3) through indirect patterns of causation unlike those contemplated by the other "take" terms, "kill," and "harass," 4) where no impact on individual members of a species need be shown, and 5) where no element of intentionality on the part of the perpetrator is required.

3. Defining "harm" to include habitat modification activities with such indirect patterns of causation is contrary to congressional intent, and should be invalidated under step one of the analysis in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The plain meaning of "take" in the context of the ESA does not include habitat modification with *Palila*-like patterns of indirect causation. Instead, the common theme of all the other "take" terms is that they refer to acts of a perpetrator that are either intended or clearly expected to directly and immediately injure an animal or reduce it to physical possession. Using the maxim *noscitur a sociis* ("a word is known by the company it keeps") to construe "harm" like the other "take" terms is appropriate because "harm" was portrayed by its legislative sponsor as simply a "technical, clarifying amendment" to the "take" definition, not a fundamental change in the "take" concept. The specific rejection in congressional committee of language

that would have made habitat modification a "take," coupled with inclusion of habitat protections in section 7 of the ESA evidences a congressional decision to limit habitat protection obligations to section 7, and not include them within the "take" prohibition of section 9. Reliance on the "comprehensiveness" of the ESA and its broad "purpose" to protect habitat cannot override the actual text and clear legislative history. Instead, it risks being an invitation to rewrite the statute to further subjective judicial notions of "good policy."

4. Post-1973 ESA amendments and legislative history, which the Secretary relies upon for a "ratification" theory, cannot save the "harm" regulation. The 1982 amendments adding the section 10 incidental take scheme do not indicate, let alone require, that "take" include habitat modifications that indirectly injure wildlife. While section 10 contemplates habitat preservation as a remedy for an "incidental take," the incidental take itself need not involve habitat modification or indirect causation. In fact, examples of incidental take in the committee reports on the 1982 amendments all involve direct and immediate causation unlike that contemplated by the "harm" regulation.

If the "harm" regulation is contrary to the congressional intent of the 1973 ESA, then the statutory "take" definition should be amended formally if "take" is to be broadened to include habitat modification with indirect causation. Because of constitutional requirements for enactment of laws, Congress cannot achieve that same amendatory result indirectly through occasional references to the *Palila* decision or the "harm" regulation in committee hearings, or the failure to enact Senator Garn's ESA bill, or statements about the scope of "take" in post-1973 committee reports, or the enactment of other ESA provisions which do not themselves purport to amend the "take" definition.

5. The "harm" regulation skews the Secretary's administration of the ESA in several ways. The "harm" regulation is used to avoid meaningful analysis of the economic impacts of designating critical habitat under section 4. The "harm" regulation also makes the habitat

protection obligations of section 7 redundant, which might explain why fewer and fewer designations of critical habitat are being made. Finally, the "harm" regulation itself harms federal-state relations insofar as it is used to threaten or coerce state and local officials to act as federal proxies in enforcing habitat modification restrictions which actually derive from the Secretary's expansive interpretation of "harm." For all these reasons, the "harm" regulation should be invalidated under step one of the *Chevron* analysis.[9/]

ARGUMENT

I. THE NATURE OF THE ACTUAL CONTROVERSY OVER THE "HARM" REGULATION IN THIS CASE

Because "harm" overlaps with other "take" terms that are not being challenged, the "harm" definition should be compared with the other "take" terms, particularly "kill" and "harass," to isolate those elements of "harm" which are distinctive, and therefore, in controversy in this case. This does not entail an "extravagant reading" and "speculative applications" of the "harm" regulation, Pet. Br. 49, but simply parsing the language of the "harm" regulation, and distinguishing "harm" from the other statutory "take" terms and definitions.

1. Despite the Secretary's emphasis on the first sentence of the "harm" definition in 50 C.F.R. section 17.3 -- which defines "harm" as "an act which actually kills or injures wildlife" -- the first sentence is at best meaningless, and at worst misleading. Defining "harm" as an act that "actually kills" is redundant since "take" already expressly includes "kill." Thus, "actually kills" is only meaningful if

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9. Because Amici States believe that the "harm" regulation should be invalidated at step one of the *Chevron* analysis, we express no view on the substantial question whether at step two of the *Chevron* analysis, the rule of lenity must supplant deference to the Secretary's interpretation of the ESA because of the criminal penalties for violation of the "harm" regulation.

it refers to acts other than those already encompassed by the statutory term "kill." Since the statutory term "kill" presumably refers to the direct application of force that directly cause death,[10] "actually kills" is only relevant insofar as it refers to a different, indirect pattern of causation -- in which case "actually kills" (which connotes immediacy and direct causation) is positively misleading.

Defining "harm" in the first sentence as "actual injury" is also meaningless, and begs the question of what constitutes "actual injury." The only place that "actual injury" is defined by the Secretary (with particular reference to habitat modification) is in the second sentence of the "harm" definition. Thus, the first sentence of the "harm" definition drops out, and the main focus should be on the second sentence.

2. The second sentence of the "harm" definition provides that acts of "harm" include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns." (Emphasis added.) The use of the word "by" (rather than "and") indicates that "actual injury" is not a separate, additional requirement; instead, "actual injury" results whenever essential behavioral patterns are impaired.[11] Consequently, only two requirements are

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10. The Secretary seems to concede as much by arguing that the term "harm" expanded the definition of "take" over what it had been in earlier wildlife statutes which used the term "kill" but did not include habitat modification prohibitions. See Pet. Br. at 25-26.

11. The district court in *Palila III*, *supra*, also construed the regulation this way by noting that habitat modification must be accompanied by "a showing of concomitant injury to Palila, such as a significant impairment of Palila breeding or feeding habitats." 649 F.Supp. at 1077, n.24 (emphasis added); see also *id.*, at 1076 n.21 (noting that the negative impact on the mamane forest "in turn injured the Palila by significantly disrupting its essential behavioral patterns." (emphasis added). Insofar as *Swan View Coalition, Inc. v. Turner*, 824 F.Supp. 923, 939 (D.Mont. 1992) suggests that "actual injury" is an additional requirement over and above impairment of essential behavioral patterns, it either misconstrued the "harm" regulation, or shrank from construing the

needed to establish "harm": 1) significant habitat modification and 2) significant impairment of essential species behavioral patterns. The suggestion by some amici that the Court should let lower courts flesh out the contours of "actual injury" is unavailing because "actual injury" -- in the context of habitat modification -- simply means "impairment of essential behavioral patterns."

3. The main characteristic of "harm," which distinguishes it from the other "take" terms, is that it involves a much more indirect and attenuated pattern of causation. This becomes apparent by considering the term "harass." Like "harm," "harass" also focuses on acts that affect "behavioral patterns" of wildlife. See 50 C.F.R. section 17.3. However, to "harass," human actions themselves must directly "annoy" a species "to such an extent as to significantly disrupt normal behavioral patterns." *Id.* In contrast, to cause "harm," human acts modify or degrade habitat, and this habitat modification then causes "actual injury" to wildlife "by significantly impairing essential behavioral patterns." For example, cutting down trees that are not occupied by a listed bird but are merely suitable for future nesting would not be "harassment" (since no birds would be present to "annoy"). However, this would constitute "harm" since the loss of the trees purportedly might impair essential behavioral patterns like future nesting.[12/] To constitute "harassment," the birds would have to be actually present and directly annoyed by a human action (for example, playing loud music to drive them from their nests). In short, human acts must directly "annoy" species and disrupt their normal behavioral patterns under the "harass" definition. Under the "harm" definition, however, human

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regulation as broadly as it is written.

12. An example of this was the Secretary's section 4(d) "take" rule for the Louisiana Black Bear. This rule required protection not only of den trees actually used by the bear, but also "candidate den trees", ie, trees that were not actually used but were nonetheless suitable for future bear dens. See 57 Fed.Reg. 593 (1992).

acts need only modify habitat, and this habitat change then can be deemed, by some plausible biological theory, to have an indirect effect on an essential behavioral pattern. The chain of causation under the "harm" definition is much more indirect and attenuated than for "harassment."[13] Moreover, "harassment," unlike "harm" requires an element of intent to annoy, i.e.., "an intentional or negligent act or omission." 50 C.F.R. section 17.3.[14] Because neither of the terms "kill" or "harass" are being challenged here, only those acts of "harm" with indirect patterns of causation are in issue.

The Secretary, in an apparent effort to narrow the scope of the harm regulation, says that the regulation contemplates actual death or injury "directly traceable" to habitat-disturbing actions. Pet. Br. at 45. (Emphasis added.) While Amici States agree that "harm" is limited to direct and not indirect *Palila*-like causation, the harm regulation, on its face, does not contain any "directly traceable" limiting language. Moreover, because the Secretary thinks that the *Palila* cases are examples of "directly traceable" harm, see Pet. Br. at 45, "directly traceable" (like "actual injury and death") is not a genuine substantive limitation on the scope of "harm."

4. The concomitant of the indirect pattern of causation contemplated by the "harm" regulation, is that "harm" can be established without any showing of an impact on an individual animal. Instead, an impact at the

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13. The genesis of the "harm" regulation also supports this analysis. Originally, the Secretary wanted to include the habitat modification concept in the definition of "harass" when it was originally proposed in 1975. See 40 Fed.Reg. 28,714 (1975). However, because the habitat modification notion presumably stretched the concept of causation in "harass" to the breaking point, the Secretary deleted it from the definition of "harass" and used the term "harm" as the vehicle for habitat modification. See J.A. 50.

14. While the Secretary says that "harass" does not fit the court of appeals' paradigm of the direct application of force, Pet. Br. at 27, the Secretary overlooks the fact that "harass" involves a more direct pattern of causation than "harm".

group or "collective" species level is sufficient to establish "harm." The Secretary, in promulgating the "harm" redefinition in 1981 acknowledged this fact[15], as have courts and commentators.[16] In *Palila III*, harm at the species level was carried to an even more bizarre extreme because the overall population of palila had actually increased, see 649 F.Supp. at 1073, yet the district court still found "harm" to the species based on an adverse impact on "recovery," i.e., the population was not increasing as rapidly as one would expect under conditions of "recovery." See 649 F.Supp. at 1075.

In sum, the actual dispute over the "harm" regulation narrows to whether acts that 1) modify or degrade habitat, and 2) thereby significantly impair essential behavioral patterns, 3) through indirect patterns of causation unlike those contemplated by the terms "kill" and "harass," 4) where no impact on individual species need be shown, and 5) where no element of human intent is required, constitute "harm" and a prohibited "take" within the meaning of Section 9.

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15. See J.A. 67 (Final Redefinition of "Harm", stating, it is not the intent of the final "harm" regulation to "limit[] 'harm' to direct physical injury to an individual member of the wildlife species."). (Emphasis added).

16. See *Palila III, supra*, 649 F.Supp. at 1075 ("A finding of "harm" does not require death to individual members of the species"); id. at 1077 ("injury to the species does not necessitate a finding of death to individual species members.") (Emphases added). See also Bean, Michael J., *The Evolution of National Wildlife Law* 344 (1983) ("direct, physical injury to an individual member of a protected species is not required to constitute harm. Rather, the significant impairment of essential behavioral patterns is sufficient to constitute actual injury to the species, whether or not any individual member of that species suffers direct, physical injury.").

II. THE PLAIN MEANING OF THE TERM "HARM" IN THE CONTEXT OF THE ESA DOES NOT INCLUDE HABITAT MODIFICATION THAT ONLY INDIRECTLY INJURES WILDLIFE

1. While the dictionary definition of "harm" includes "injure," "damage" and "hurt," "harm" must be construed, not in the abstract, but in the particular context of the ESA. Using the maxim *noscitur a sociis* ("a word is known by the company it keeps"), is not only a common method of statutory construction,[17] but it is doubly appropriate here because of the genesis of the "harm" term. "Harm" was added on the Senate floor without any debate as part of a package of 24 other amendments that were described by Senator Tunney, the floor manager, as "technical and clarifying amendments." See 119 Cong.Rec. 25,682-83 (1973). Since Congress' intent was not to significantly change the then-existing scope of the "take" definition, it makes sense to construe "harm" like the other "take" terms. This is not a case of picking and choosing among various canons of statutory construction to reject a reasonable agency construction. See Pet. Br. at 22, n.10. Instead, the use of *noscitur* is faithful to the understanding and intent of Congress when it added "harm" to the statute.[18]

2. In comparing "harm" to the other "take" terms, two common themes emerge. First, all of the other terms, i.e.,"harass," "pursue," "hunt," "shoot," "wound," "kill," "trap," "capture," "collect," refer to acts of a perpetrator rather

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17. See *Brown v. Gardner*, 115 S.Ct. 552, 555 (1994); *United States v. Burke*, 112 S.Ct. 1867, 1875 (1992) (Scalia, J., concurring); *Dole v. Steelworkers*, 494 U.S. 26, 36 (1990); *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 8 (1985).

18. According to *Gidari, supra*, p.78, the Secretary's amicus curiae brief in *Palila IV*, 852 F.2d 1106 (9th Cir. 1988), argued much the same thing by stating: "It is inconceivable that addition of the term characterized as a 'technical' insertion should be the basis for an interpretation both significantly broader than the other statutory terms and inclusive of a specific concept (habitat modification) eliminated from the bill."

than an adverse effect on an animal. This is confirmed by the last phrase of section 1532(19) which includes as a "take" any "attempt to engage in any such conduct"., 16 U.S.C. section 1532(19) (Emphasis added). "Such conduct" refers to the preceding list of "take" terms, i.e., "hunt," "shoot," "wound," etc; therefore, these terms refer to "conduct" of a perpetrator, not "injury" to a species. Moreover, since an attempt can fail and cause no injury at all to an animal yet still constitute a "take", (like an unsuccessful attempt to "trap" an animal), the "take" definition looks fundamentally to the acts of the perpetrator, not the adverse impact on wildlife.

The second common theme of the "take" terms is that all of these acts of a perpetrator involve either an intent to injure an animal, or the immediate foreseeability of injury as a direct and immediate result. Thus, the pattern of causation between the act of the perpetrator and injury to the animal is immediate and direct. While the Secretary says that *noscitur* is inappropriate because the "take" definition includes both "broader" and "narrower" terms, Pet. Br. at 22, and because not all of the "take" terms involve the "direct application of force," *id.*, this sidesteps the key issue of whether the other "take" terms divulge any common theme regarding causation. Amici States believe that all of the "take" terms contemplate direct and immediate causation -- and that is what is at issue, not whether the terms are "broad" or "narrow."

The alternative to using *noscitur* to identify the type of causation contemplated by the other "take" terms is to take the abstract, dictionary definition of "harm" as "injure," "damage" or "hurt," and then include every conceivable human act that "injures" or "hurts" regardless of how indirect and attenuated the pattern of causation between the act and the injury.[19] That not only would

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19. This seems to be the Secretary's argument since he contends that there is no reason why Congress would have wanted to exclude injury to wildlife when it is brought about indirectly through habitat destruction, Pet. Br. at 21, and that "harm" should apply to all conduct that the other

make all the other "take" terms redundant (since "harm" would cover them all), but it would be contrary to Congressional intent to construe "harm" like the other "take" terms, i.e., as a "technical" addition and mere "clarification."

3. Use of the term "take" or its variants in other provisions of the ESA also indicates that "take" refers to the direct physical "take" of individual animals, not actions that indirectly cause injury at the aggregate or species level through habitat modification. See 16 U.S.C. section 1539(e)(1) (taking by certain Alaska natives not prohibited "if such taking is primarily for subsistence purposes," but taking by non-natives is prohibited if they are not primarily dependent upon "the taking of fish and wildlife for consumption or for the creation and sale of authentic native articles of handicrafts and clothing"); *id.*, section 1539(e)(2) "taking [under the Alaska natives taking exception] may not be accomplished in a wasteful manner"); *id.* section 1539(i) (no importation violation if "fish or wildlife was lawfully taken and exported from the country of origin and country of reexport, if any"); *id.*, section 1540(e)(4)(A) ("All fish or wildlife or plants taken . . . shall be subject to forfeiture"). (Emphases added.) Because "take" was used throughout the ESA in its common well-established sense of a direct physical "take" of individual animals, and because "[a] term appearing in several places in a statutory text is generally read the same way each time it appears," *Ratzlaff v. United States*, 114 S.Ct. 655, 660 (1994), "harm" should not be given a radically different meaning of habitat modification and indirect causation which is alien to all the other "take" terms.

"take" terms "exemplify", *id.* at 23.

III. THE LEGISLATIVE HISTORY OF THE 1973 ESA CONFIRMS THAT "HARM" DOES NOT INCLUDE HABITAT MODIFICATION THAT ONLY INDIRECTLY INJURES SPECIES

1. S. 1983, the precursor bill for the ESA, originally defined "take" to include "the destruction, modification, or curtailment of a [species] habitat or range." See S. 1983, section 3(6), reprinted in *Endangered Species Act of 1973: Hearings Before the Subcomm. on Environment of the Senate Comm. on Commerce*, 93d Cong., 1st Sess. 27 (1973) ("*1973 Senate Hearings*"). However, this language was deleted from the bill in the Senate Commerce Committee even though representatives of environmental organizations urged that "take" should include habitat modification. *1973 Senate Hearings*, 80, 86, 104, 106, 108, 116, 123. H.R. 37, the House bill did not include habitat modification language in its "take" definition, *Endangered Species: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 93d Cong., 1st Sess. 90 (1973) ("*1973 House Hearings*"), even though environmental organization representatives urged its inclusion during House committee hearings, *id.* at 299, 301, 305-306, 307, 309. Thus, both Houses of Congress rejected entreaties to include the concept of habitat modification in the "take" definition, and the Senate committee struck specific habitat modification language from the "take" definition in the bill it reported.

As noted previously, the term "harm" was added to the legislation on the Senate floor, without any debate, as part of a package of "technical and clarifying" amendments. Other than the general statement that they were "technical and clarifying" amendments that were "important" and would "help achieve the purposes of the bill," 119 Cong.Rec. 25,683 (1973), no other explanation was given why "harm" was added to the "take" definition.

Significantly, members of both bodies distinguished between habitat modification -- which was to be remedied through the land acquisition program of section 5 -- and

"predation" of animals -- which was to be controlled through the "take" prohibition. See 119 Cong.Rec. 30,162 (Rep. Sullivan); *id.*, 25,669 (Sen. Tunney); *id.*, 25,691 (Sen. Nelson); *id.*, 25,675-25,676 (Sen. Williams). Nowhere in the 1973 legislative history is there any evidence that Congress intended or understood the terms "harm" or "take" to include habitat modification that only indirectly causes injury to listed species.

2. Given this legislative history, it seems inescapable that "harm" does not include habitat modification. Where Congress expressly deleted habitat modification language from a precursor bill, inclusion of the same concept by way of agency-adopted regulation reaches a result that Congress "expressly declined to enact". *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974); see also *TVA v. Hill*, 437 U.S. 153, 181-182 (1978) (according significance to differences between the final ESA legislation and the earlier bill, S. 1983). The Secretary, however, urges that the rejection of the broad habitat modification language in S. 1983 does not necessarily indicate rejection of a more limited concept of "significant" habitat modification that "actually kills or injures" species "by significantly impairing essential behavioral patterns." Pet. Br. 29. But if the Senate Committee or Congress had intended to endorse a narrower class of habitat modifications as a "take," surely they would have amended the habitat modification language in S. 1983 to reach that more limited result rather than delete the habitat modification language entirely. Since Congress provided for protection against the "adverse modification or destruction of [critical] habitat" in section 7, 16 U.S.C. section 1536(a)(2), it would have had no difficulty devising similar language referring to "habitat modification" if it had intended "take" to include a more limited version of that concept. Moreover, if the term "harm" (which the Secretary otherwise portrays as a general term signifying "injure," "damage" "hurt," Pet. Br. 20) also does double duty as a shorthand reference to a smaller subclass of habitat modifications, then surely "harm" would not have been portrayed by its legislative sponsor as an innocuous technical amendment, particularly

when the relevant Senate committee had rejected a closely related habitat concept. The only plausible interpretation is that Congress rejected the whole concept of habitat modification and its indirect impact on species as a "take," and did not intend "harm" to bring in by the back door a habitat modification concept previously rejected in committee.

The reference in Senate Report No. 307 that "take" be defined broadly, Pet. Br. 27-28, cannot justify the Secretary's definition of "harm." The Senate Report was referring to the "take" definition in the Senate bill before the term "harm" was added to the legislation. The Secretary, as far as we are aware, does not contend that the "take" definition, at this stage of its evolution, included habitat modification.[20/] Thus, the reference to defining "take" broadly simply refers to "direct, physical" takes. Since the bill reported from committee included the terms in S. 1592, plus "harass" from S. 1983, see Pet. Br. 28, it made sense for the Senate Report to say that "take" had been defined broadly, i.e., it incorporated "take" terms from both bills. However, the reference in the Senate Report to the broadest possible definition cannot apply to the term "harm" which had not yet been added to the bill, and cannot negate the statement of the "harm" amendment sponsor that it was merely a technical, clarifying amendment.

While the 1973 Congress recognized the importance of habitat for endangered species, that cannot justify construing "harm" as the Secretary has. When it enacted earlier endangered species legislation in 1966 and 1969, Congress also recognized that habitat loss was a major

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20. By deleting the habitat modification concept from the proposed definition of "harass" in 1975, see J.A. 50, the Secretary apparently conceded that "harass" cannot support a habitat modification concept. All of the other "take" terms in S.1983 as it emerged from Committee, i.e., "pursue", "hunt", "shoot", "wound", "kill", "trap", "capture", "collect" or "attempt to engage in any such conduct" on their face do not cover ordinary habitat modification like land clearing and timbering.

cause of species extinction.[21/] Despite awareness of the importance of habitat, Congress chose not to restrict private habitat modification activities through a "take" or any other restriction in the earlier endangered species legislation. While the Secretary suggests it is anomalous that Congress would prohibit the killing or injuring of wildlife by rifle shot but not by habitat modification, Pet. Br. 21, statutes are political compromises, not exercises in perfect policymaking. All along Congress has been willing to outlaw what are commonly thought of as "direct physical takes" of wildlife, but unwilling to criminalize as a "take" a broad range of common land use activities that have only indirect impacts on wildlife.[22/] In the end, the "policies" and "comprehensiveness" of the 1973 legislation is too vague and protean a concept to be a reliable guide to legislative intent, and cannot override the plain language and legislative history that stands in the

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21. See Endangered Species Protection Act of 1966, Pub.L.No.89-669, section 1(c), 80 Stat. 926 (endangered status can be based upon finding that species "habitat is threatened with destruction"); section 1(b) (congressional policy that federal agencies "preserve the habitats of . threatened species"); Endangered Species Conservation Act of 1969, Pub.L.No. 91-135, section 3(a)(1), 83 Stat. 275, (endangered status can be based upon "the destruction, drastic modification or severe curtailment . . of . . habitat"); see also S. Rep. No. 526, 91st Cong., 1st Sess. 2 (1969) (recognizing "destruction of habitat in which the species can live and propagate" as one of the basic reasons for species extinction).

22. While the Secretary urges that the 1973 ESA represents an expansion of the "take" concept over that in earlier wildlife legislation, Pet. Br. 25-26, the only significant new "take" terms in 1973 were "harass" -- which the Secretary appears to concede does not include habitat modification, see *infra*, p.20, n.20, and "harm" which was merely a "technical, clarifying amendment". We do agree that the 1973 ESA differs markedly from the earlier endangered species and wildlife acts in terms of other protections and procedures. However, "take" in other wildlife statutes had acquired the generally accepted meaning of acts that are intended or expected to directly and immediately injure wildlife, and this carried through in the 1973 ESA legislation.

way of the Secretary's interpretation.[23]

IV. THE POST-1973 ESA AMENDMENTS AND LEGISLATIVE HISTORY DO NOT RATIFY THE "HARM" REGULATION

1. The post-1973 ESA amendments and legislative history should not be treated as purported evidence of the reasonableness of the "harm" regulation. Instead, the post-1973 legislative materials stand in a fundamentally different light than those for the 1973 Act. The "take" definition was enacted in 1973, and has never been amended. Therefore, the relevant reference point for congressional intent is 1973 when the definition was enacted, not some "evolving" intent that becomes apparent over time through various amendments to the ESA. Cf. *West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 101 n.7 (1991) ("The 'will of Congress' we look to is not a will evolving from Session to Session, but a will expressed and fixed in a particular enactment."). Even if a post-1973 Congress or committee thereof believed that "harm" included habitat modification, "the views of one Congress as to the meaning of an act passed by an earlier Congress are not ordinarily of great weight" *U.S. v. X-Citement Video, Inc.*, 115 S.Ct. 464, 471, n. 6 (1994); see also *Central Bank v. First Interstate Bank*, 114 S.Ct. 1439, 1452 (1994); *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 839-840 (1988). The reenactment or ratification doctrine -- i.e., the notion that Congress can be presumed to have ratified an administrative or judicial

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23. See City of *Chicago v. Environmental Defense Fund*, 114 S.Ct. 1588, 1594 (1994) "it is not unusual for legislation to contain diverse purposes that must be reconciled, and the most reliable guide for that task is the enacted text."); *Central Bank v. First Interstate Bank*, 114 S.Ct.1439, 1453-54 (1994) ("Policy considerations cannot override our interpretation of the text and structure of the Act"); *MCI Telecommunications v. American Tel. & Tel.*, 114 S.Ct. 2223, 2233 (1994) ("our estimations, and the [FCC's] estimations, of desirable policy cannot alter the meaning of the Federal Communications Act of 1943.").

construction of a particular statute by reenacting that specific statute after being fully aware of the administrative or judicial construction -- does not strictly apply here. The "take" definition in the ESA has never been reenacted, and there is only tenuous evidence of congressional awareness of the "harm" regulation. Moreover, it is questionable whether the reenactment doctrine is still viable. See *Brown v. Gardner, supra*, 115 S.Ct. at 556 ("There is an obvious trump to the reenactment argument, however, in the rule that '[w]here the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction,'" quoting *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991).) Thus, if the Court finds under step one of the *Chevron* doctrine that the "harm" regulation is contrary to congressional intent in the 1973 legislation, it is doubtful whether <u>any</u> showing of post-1973 legislative history could <u>ever</u> sustain the Secretary's "harm" regulation. Instead, the Enactment and Presentment Clauses should require that the "harm" definition be formally amended, in compliance with Constitutional law-making processes, to attain the desired alteration in the meaning of "take." It should not be constitutionally permissible to accomplish the same amendatory result through "indirection," *N.L.R.B. v. Health Care & Retirement Corp.*, 114 S.Ct.1778, 1785 (1994), such as by statements in committee reports or hearings, *id.* at 1784; *SEC v. Sloan*, 436 U.S. 103, 120-121 (1978); by not enacting other legislative proposals or through silence, *Brown v. Gardner, supra*, 115 S.Ct. at 557; *Central Bank, supra*, 114 S.Ct. at 1453; *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 (1989); or by enacting other statutory provisions which do not themselves purport to amend the "take" definition in section 1532(19).

2. In any event, enactment of the Section 10 "incidental take" permit scheme does not ratify, either expressly or impliedly, the "harm" regulation. "Incidental" for purposes of Section 10 simply means unintentional, i.e., not the purpose of the original activity. See section 10(a)(1)(B) (referring to taking "incidental to, and not the purpose of" the activity); 50 C.F.R. section 17.3 (defining

"incidental taking"); H.R. Rep. No. 567, 97th Cong., 2d Sess. 31 (1982). It says nothing at all about the pattern of causation by which an unintentional take occurs. The fact that one can anticipate an "incidental" take in advance does not imply that habitat modification activities with indirect causation must necessarily be included as "incidental" takes. For example, the classic example of an "incidental" take -- taken directly from the 1982 ESA hearings,[24/] -- is a power plant which (without intending to do so) entrains listed fish, eggs or larvae into its cooling system, killing them. Such a take is "incidental," i.e., unintentional and not the purpose of the power plant, yet it also can be anticipated in advance if one knows that the fish inhabit the waters by the cooling intake. However, the "take" in such a case still involves direct and immediate causation whereby the fish are killed by the pump rotators, rather than through an indirect *Palila*-like pattern of causation.[25/]

3. The provision for "conservation plans" in section 10 also does not ratify the "harm" regulation. To continue with the above "incidental" take example, if the power plant knows that listed fish may be taken, it can seek to minimize or mitigate the expected "take;" for example, monitoring for the presence of the fish and reducing

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24. See *Endangered Species Act: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 97th Cong., 2d Sess. 356-360 (1982) ("*1982 House Hearings*"); *Endangered Species Act Amendments of 1982: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 97th Cong., 2d Sess. 295-303 (1982) ("*1982 Senate Hearings*").

25. That the power plant entrainment example might arise under section 7, rather than section 10, see Pet. Br. 36, n.22, is of no moment since similar examples readily arise under section 10. For example, private farmers throughout California (and the West) divert large quantities of water -- the lifeblood of the West -- from streams that may contain listed species. Such diversions may "incidentally" take listed species in those waters, and kill them by battering against pump blades, fish screens, etc.

pumping when fish are present, or using alternative cooling methods during certain seasons or times when fish are expected. However, some fish will be "taken" inevitably, so the only way to compensate for the loss would be to provide some offsetting habitat benefits. Much as the power plant might prefer to buy or obtain like-kind fish to replace those incidentally taken, the fish are, by definition, scarce i.e., threatened or endangered, so the only coin of the realm is some form of "habitat" benefits. The Secretary goes too far in suggesting that because provision of habitat is the prescribed (indeed, often the only) remedy, the original "take" also must involve habitat modification or loss. To the contrary, the examples of "incidental" take in the Congressional reports on the 1982 ESA amendments all involve what we have called "direct, physical" takes and immediate causation. None of them involve indirect causation or habitat modification activities.[26/]

4. The San Bruno Mountain Butterfly plan was clearly the model that Congress had in mind when it provided for Section 10 conservation plans -- indeed, the parties interested in the San Bruno plan were largely responsible for obtaining the Section 10 legislation. See 1982 House Hearings, 327-335, 339-340. But it reads too much into the legislative history to suggest that Congress understood or assumed that the threatened "take" of butterflies on San Bruno Mountain was based on habitat modification, and not a direct physical take of butterflies. The legislative history does not expressly characterize the threatened San Bruno "take" as "harm" based on habitat

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26. See S.Rep. No.418, 97th Cong., 2d Sess. 8 (1982) (referring to "incidental taking of experimental populations, such as the inadvertent taking of experimental fish species by those fishing for other species on the same body of water"); H.R.Rep. No. 567, 97th Cong., 2d Sess. 27 (1982) (referring to incidental take example of "eggs of an endangered or threatened fish which will be sucked into a power plant when water is used as a cooling mechanism"); *id.*, 34 (referring to incidental taking "of experimental fish species by those fishing for other species in the same body of water").

modification. This is understandable since Congress was more interested in a solution to the San Bruno problem rather than characterizing the type of "take" involved. Nonetheless, it is clear that the San Bruno development would have destroyed, through bulldozing and clearing, almost all of the area occupied by the threatened butterflies. Therefore, the landclearing effort would necessarily have injured and "harmed" butterflies directly -- i.e., by crushing and killing the eggs, larvae and the butterflies themselves through bulldozing and ground leveling. See *1982 House Hearings* 335 (*New York Times* article in the hearing record, stating: "Since the butterflies lived year-round on the mountain, any construction would kill some of them and destroy part of their habitat.") (Emphasis added.) Thus, while Congress knew that the San Bruno example involved a land use development, it is more likely that Congress assumed that a direct physical "take" was involved, rather than an indirect "take" through habitat modification. Moreover, the Secretary has not and cannot show that the Section 10 "incidental take" permit scheme only makes sense if "take" includes habitat modification. Instead, Section 10 is still a completely meaningful provision if "take" is assumed to involve only direct patterns of causation.

5. Finally, the main purpose of the 1982 amendments was to lessen the burdens that section 9 placed on private and governmental projects and activities. It would stand those amendments on their head to find that they expanded section 9 by ratifying a "harm" definition not otherwise included within the scope of the original 1973 Act.

V. THE "HARM" REGULATION DISTORTS THE SECRETARY'S INTERPRETATION AND ADMINISTRATION OF THE ESA

1. The "harm" regulation distorts the Secretary's administration of the ESA in several ways. First, the "harm" regulation is used as a justification for not conducting a meaningful analysis of the economic impacts of designating critical habitat. Section 4(b)(2), 16 U.S.C.

section 1533(b)(2) provides, in pertinent part, that the Secretary shall designate critical habitat "after taking into consideration the economic impact" of such designation. This provision, which was added to the ESA as part of the 1978 amendments, was described by Rep. Murphy, the House floor manager, as "the most significant provision in the entire bill," 124 Cong. Rec. 38,666 (1978). The provision was intended to significantly change the way that critical habitat designations had been made, and make them no longer based solely on biological criteria. See H.R. Rep. No. 1625, 95th Cong., 2d Sess. 17.

The FWS however, avoids this requirement of analyzing economic impacts, partly through the "harm" regulation. FWS argues that habitat is protected under both the section 7 "no-jeopardy" and section 9 "take" prohibition. Listing a species -- which is based solely on non-economic biological criteria -- automatically triggers these section 7 and 9 habitat protections, according to FWS. Therefore, the only economic impacts that need be considered in designating critical habitat are those "incremental" economic impacts over and above economic impacts attributable to section 7 and 9 habitat protection. These "incremental" economic impacts invariably turn out to be minimal. Thus, defining Section 9 "harm" as habitat modification helps eviscerate the section 4(b)(2) requirement to consider economic impacts in designating critical habitat. The FWS has not only used the "harm" regulation and the magic of "incrementalism" to dispense with meaningful economic analysis of the impacts of designating a large portion of California's developed water supply as critical habitat for the delta smelt,[27] but it routinely uses this "incrementalism" argument in

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27. See 59 Fed.Reg 857 (1994) (proposed critical habitat for the delta smelt) ("The Act provides significant protection to species, including protection to their habitats, as a result of listing. Therefore, the direct economic and other impacts resulting from additional habitat protection through critical habitat designation may be incrementally small.")

designating critical habitat under the ESA.[28/]

2. The "harm" regulation also makes section 7 redundant insofar as habitat is concerned. In addition to the avoidance of jeopardy to species, section 7(a)(2) imposes upon federal agencies the obligation to avoid "the destruction or adverse modification of [critical] habitat." "Critical habitat" consists of those areas that are essential to the "conservation" of the species. 16 U.S.C. section 1532(5)(A). "Conservation" (or its synonym "recovery," see 50 C.F.R. section 402.02) refers to bringing a species back to the point at which listing as threatened or endangered is no longer necessary. 16 U.S.C. section 1532(3).

Although "critical habitat" consists of that area needed for "recovery" of a species, the Secretary has defined the duty in section 7(a)(2) to avoid "the destruction or adverse modification of critical habitat" more narrowly.[29/] Modification of critical habitat must rise to a certain level, i.e., it must affect species "survival" as well as "recovery," before the section 7(a)(2) prohibition against modifying critical habitat is triggered. The jeopardy standard in section 7 is also keyed to the same standard of "survival and recovery." See 50 C.F.R. section 402.02. Therefore, under FWS's regulations, the "jeopardy" and "destruction/adverse modification of critical habitat" standards in section 7 are one and the same, as both the FWS[30/] and commentators have recognized.[31/]

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28. See 59 Fed. Reg. 39,717 (1994); 58 Fed. Reg. 68,551 (1993); 58 Fed. Reg. 17,183 (1993); 58 Fed. Reg. 6,586 (1993); 57 Fed. Reg. 57,052 (1992); 57 Fed. Reg. 36,627 (1992).

29. 50 C.F.R. §402.02 provides:

"Destruction or adverse modification means a direct or indirect alteration that apparently diminishes the value of critical habitat for both the survival and recovery of a listed species." (Emphasis added).

30. See 56 Fed. Reg. 19,812 (1991) ("'Destruction or adverse modification' is defined as an alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. In practice, the threshold required to make a finding of

It follows from this that the "harm" regulation makes section 7 critical habitat protections redundant.[32] Habitat modification qualifies as "destruction/adverse modification of critical habitat" in section 7 only when it rises to the level of threatening species jeopardy. In contrast, habitat modification qualifies as "harm" under the Secretary's regulation when it merely impairs "essential behavioral patterns" like breeding, feeding, or sheltering of a single animal. It would be virtually impossible to threaten jeopardy to a species (and trigger the section 7 "destruction/adverse modification" prohibition), yet not impair essential behavioral patterns of a single animal (which is enough to trigger "harm" under section 9). Thus, the section 9 "harm" prohibition not only completely duplicates the habitat protection of section 7, but it goes way beyond it in scope, in effect extending section 7 habitat protections to areas not designated as critical habitat. This may explain why designations of critical habitat have not kept pace with listing decisions, see *GAO Report, supra,* 6 (noting only 105 critical habitat designations) despite Congress' intent that they be done concurrently in most cases. 16 U.S.C. section 1533(a)(3)(A) (critical habitat to be designated concurrently with a listing decision "to the maximum extent

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'jeopardy' or 'destruction or adverse modification' of critical habitat are identical.") (Emphasis added); see also 57 Fed. Reg. 57,053 (1992); 58 Fed. Reg. 17,183 (1993); 58 Fed. Reg. 45,272 (1993); 58 Fed. Reg. 68,550 (1993).

31. See Stelle, W., *Major Issues in Reauthorization of the Endangered Species Act*, 24 Envtl. L. 321, 325 n.19 (1994); Yagerman, K., *Protecting Critical Habitat Under the Federal Endangered Species Act*, 20 Envtl. L. 811, 840-814 (1990); *Habitat Conservation Planning, supra,* 220, n.7.

32. See Salzman, J., *Evolution and Application of Critical Habitat under the Endangered Species Act*, 14 Harv.Env.L.R. 311, 329 (1990); Bean, M., *The Evolution of National Wildlife Law* 397 (U.S.Gov.Printing 1977).

prudent and determinable"); 50 C.F.R. section 424.12(a); H.R. Conf. Rep. No. 1804, 95th Cong.,2d Sess. 27 (1978)(noting the "rather rare instances where no critical habitat is proposed concurrently with the listing"); H.R. Rep. No.1625, 95th Cong. 2d Sess. 18 (1978) (same). Construing section 9 to protect habitat, as the Secretary has done, achieves the section 7 habitat protection purpose without the bother of analyzing the economic impacts of designating critical habitat.

CONCLUSION

Because the Secretary's "harm" regulation exceeds the scope of the ESA, and is contrary to clearly expressed congressional intent, the judgment of the court of appeals should be affirmed.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

BRUCE BABBITT, Secretary of the United States Department of the Interior, *et al.*, *Petitioners*,

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, *et al.*, *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* STATE OF TEXAS IN SUPPORT OF AFFIRMANCE

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Senate Report No. 307, 93d Cong., 1st Sess. 14 (1973). 12

TREATISES

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INTERESTS OF AMICUS CURIAE STATE OF TEXAS

This brief is submitted by *amicus curiae* State of Texas ("Texas") on behalf of the state, its local governments, and the private groups that have endorsed this brief.[1] It is also submitted by Texas in its capacity as *parens patriae* in order to protect the self-governing and private property rights of Texas citizens. Texas and the members of the private groups endorsing this brief are affected by the *de facto* comprehensive resource management scheme contrived by the Petitioners on the basis of their overexpansive interpretation of the term "harm" (and therefore "take") as contained in the Endangered Species Act ("ESA").[2] This scheme will convert substantial amounts of private property and state property into *de facto* "federal wildlife preserves," the onus of which may be avoided only by securing an ESA § 10(a) "incidental take" permit.

Texas and its political subdivisions seek to vindicate and protect fundamental, historical attributes of state sovereignty and self-government, including their police power to make and enforce laws to protect their citizens' health, safety, and property against the intrusion of the United States Fish and Wildlife Service ("FWS").[3]

SUMMARY OF ARGUMENT

I. Deference to FWS's "harm" regulation pursuant to the step 2 analysis of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) is inappropriate because the challenged agency regulation intrudes into areas of constitutionally-protected state authority without a plain statement from Congress. The intrusion results in derogation of Texas' and its citizens' self-governing and property rights.

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[1] The list of the private groups who have endorsed this brief is included in the Appendix at 1a.

[2] 16 U.S.C. §§ 1531-1544.

[3] Because Petitioner Secretary of the Interior has delegated his ESA authority to the FWS, Texas will refer to Petitioners collectively as "Petitioners" or "FWS."

When Congress desires to intrude into areas of state sovereignty or authority, it must do so plainly, with unmistakably clear language in the text of a statute. Agency regulations which intrude on a state's and its citizens' self-governing and property rights must be measured against that stringent standard. Any less stringent standard (such as the application of the step two analysis of *Chevron*) would allow Congress and federal agencies to circumvent the protections afforded the states by the "plain statement rule." Furthermore, it is a fundamental principle of statutory construction that constitutional questions should be avoided when possible.

The Tenth Amendment, the Guarantee Clause, and the inherent structure of the Constitution protect the self-governing rights and sovereignty of states. These rights ultimately devolve to the citizens of the state in order to protect them from overreaching by the federal government. Pursuant to their self-governing rights, Texas and its citizens have established a legal framework defining property rights and the powers of state and local governments to regulate and manage resources. The ESA's language and legislative history do not indicate that Congress intended to interfere (to the extent sought by FWS) with states' land use planning and water rights.

II. The FWS "harm" regulation intrudes into two deeply-rooted areas reserved to the states and protected by the Constitution: the control, allocation, and use of water resources and land use management (including protection of private property). FWS's overexpansive interpretation of the word "harm" results in a *de facto* comprehensive resource management scheme in Texas that is extensive, undefined, unpredictable, and expensive. As a result, landowners use their land at the risk of civil and criminal sanctions.

Using the overexpansive "harm" regulation, the FWS has not only run roughshod over long-established Texas water law and property law, it has seized control over land use planning throughout large sections of the state from Texas and its local governments.

Conclusion

FWS's definition of "harm" is *ultra vires* because it fails the step one analysis of *Chevron*. It is furthermore *ultra vires* because Congress did not plainly state that FWS was authorized to infringe upon important areas of state governmental and sovereignty rights and because the interpretation needlessly raises constitutional issues by infringing on the rights and powers of Texas and its citizens protected and reserved by the Tenth Amendment, the Guarantee Clause, and the inherent structure of the Constitution. The Court of Appeals' decision should be affirmed.

ARGUMENT

The Endangered Species Act ("ESA")[4] makes it unlawful for any person to "take" an endangered species. 16 U.S.C. § 1538(a)(1). A "take" is defined by statute to include "harm." There is no statutory definition of "harm." By regulation, however, FWS has defined "harm" as follows:

> "Harm" in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.

50 C.F.R. § 17.3 (1994).

On the basis of this overexpansive interpretation of "harm," FWS has contrived a *de facto* comprehensive resource management scheme in Texas that prevents Texas and its landowners from using their land, property, and resources in ordinary, customary ways (such as building homes and pumping groundwater) in accordance with state and local law.

As a result of the FWS's "harm" regulation, Danny McFadin, a Uvalde County farmer, must decide either to stop pumping Edwards Aquifer water necessary to irrigate his crops or to continue to pump the water and risk fines and jail for "takes" of endangered species. Remarkably, the endangered species at issue are not on his land. Rather, the protected species live in springs

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[4] 16 U.S.C. § 1531 *et seq.*

over 100 miles away. Hundreds of other farmers and dozens of cities in Central Texas face the same dilemma. San Antonio, for example, pumps all of its water from the Edwards Aquifer. San Antonio is now challenged with ensuring the long term delivery of water to its residents for residential, business, economic development, and other essential uses.

A federal district court adopting the FWS's view of "harm" has threatened to impose pumping limits on San Antonio and the irrigators unless they or Texas does so first.[5] Despite Texas's legislative efforts, including the creation of a new "Edwards Aquifer Authority" ("EAA"), the court remains unsatisfied and is apparently ready to federalize the Edwards Aquifer or eviscerate Texas' groundwater law in order to impose pumping limitations. According to the mayor of San Antonio, the effect of such limitations would "stick a dagger in the economic heart of the community."[6]

Not even national security or the readiness of the nation's armed forces stationed in Central Texas are immune from the reach of the ESA theory embraced in the Edwards Aquifer case. The Department of Air Force is confronted at Kelly Air Force Base (located in San Antonio) with the same problem facing Mr. McFadin. Whether the base is closed or whether activities can be expanded depends now on whether there will be sufficient water in the event pumping is limited from the aquifer.[7]

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[5] *Sierra Club v. Babbitt*, No. MO-91-CA 069 (W.D. Tex. May 26, 1993) (amended order) ("*Sierra Club I*"). The court relied heavily upon testimony by a FWS official to the effect (1) there were "takes" as a matter of fact and as a matter of administrative interpretation of the ESA, and (2) the Texas legislative session ending May 1993 represented the "last chance" for the legislature to solve the supposed "take" problem before the "blunt axes" of the ESA would have to be dropped on Texas. *Id.* Amended Findings of Fact and Conclusions of Law ¶ 161(May 26, 1993).

[6] "Fed hearing on species act brings out anger in Boerne [Texas]," *San Antonio Express News*, March 21, 1995, at 1 (statement of Nelson Wolff, Mayor of San Antonio).

[7] Texas is concerned about the growing interpenetration between ESA §§ 7 and 9 as applied by the FWS. If the FWS cannot use its overexpansive interpretation of "harm" pursuant to ESA § 9 to directly reach activity on private land (such as the pumping of groundwater or the clearing of cedar trees) that it believes is "harming" a listed species, then it will attempt to

Margaret Rodgers, who owns land in Travis County, has received letters from the FWS informing her that clearing her land to build a fence may "take" an endangered species--the golden-cheeked warbler. The letters stated that she could be subject to a fine of up to $50,000 and imprisonment up to one year. Understandably, she stopped trying to build the fence. The letters did not accuse her of killing or injuring a warbler; in fact, they did not even say that any warblers live, or have ever been seen, on her property--the mere clearing of her land was sufficient reason to prompt the FWS to send its letters. Hundreds of other landowners in Texas are in Mrs. Rodgers' predicament.

Mr. McFadin and Mrs. Rodgers at least have notice that they risk civil and criminal penalties in using their land. But because FWS does not make clear the extent of its resource management program, other Texas landowners and governmental entities are unaware that they are also subject to penalties for making ordinary use of their land.

I. STEP TWO OF THE CHEVRON STANDARD--"DEFERENCE TO ADMINISTRATIVE INTERPRETATION"--IS AN INADEQUATE STANDARD OF REVIEW BECAUSE THE CHALLENGED FWS REGULATION SUBSTANTIALLY ALTERS THE TRADITIONAL STATE/FEDERAL BALANCE.

Petitioners argue that the Court should review the FWS "harm" regulation under the two-step analysis set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). *Petitioners' Brief* at 20. Step one of the *Chevron* analysis determines whether "Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to unambiguously expressed intent of Congress." 467 U.S. at 842-843. Texas agrees with the Court of Appeals and Respondents that the FWS

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increase its efforts to control those supposed harmful activities indirectly through forced consultation with a federal agency (pursuant to ESA § 7) having *some* federal program delivery nexus with the landowner. For example, in the Edwards Aquifer situation, the FWS could pressure the Farmers Home Administration through the ESA § 7 consultation process to refrain from making or guaranteeing loans to farmers seeking financing for farming activities which depend on the pumping of aquifer water.

"harm" regulation fails step one of the *Chevron* test and is *ultra vires*.[8]

Petitioners argue, nonetheless, that if the Court finds the ESA silent or ambiguous regarding the issue of whether habitat modification by itself constitutes a "take," then it should apply step two of the *Chevron* analysis and give "substantial deference" to FWS's interpretation. *Petitioners' Brief* at 16. Texas disagrees. While *Chevron's* "deference to agency interpretation" of an ambiguous statutory term may provide a proper standard for conventional review of a regulation, it is inadequate for reviewing a regulation which deeply intrudes into traditional state authority and upsets the appropriate balance between federal and state governments.

The *prudential* presumption of judicial "deference to the administrative agency" must yield to giving greater weight to *constitutional* concerns regarding federalism and dual sovereignty when a federal agency intrudes into areas reserved to the states. In such cases, the Court should more closely scrutinize the agency regulation to ensure that Congress clearly and unambiguously intended the intrusion. Thus, a heightened standard of review--"*Chevron* Step Two-Plus"--for the FWS "harm" regulation should be adopted by the Court because fundamental doctrines of federalism and the self-governing rights, powers, and duties of states and local governments are at stake.

A. THE PLAIN STATEMENT RULE.

In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the Court articulated the "plain statement rule" with respect to determining whether Congress intended to override state self-governing rights and powers. "Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States." *Gregory*, 501 U.S. at 461 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). To make its intention clear and manifest, Congress must be "unmistakably clear in the language of the statute." *Id.* at 460-

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[8] Texas supports the Court of Appeals' ruling and the Respondents' position in this regard. Texas will limit its brief to federalism-based issues because the conventional *Chevron* analysis issues are being briefed by the parties to this case.

461 (citing *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)). "This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 461.

The plain statement rule, furthermore, ensures that when an interpretation of a statute would "upset the usual constitutional balance of federal and state powers, . . . it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this balance." *Id.* at 460 (citation and quotation marks omitted). This rule rests on the understanding that while "Congress may legislate in areas traditionally regulated by the States," the power to do so is "an extraordinary power in a federalist system," which courts "must assume that Congress does not exercise lightly." *Id.* at 460.[9]

B. Constitutional Issues Should Be Avoided Where Possible.

It is axiomatic, when reviewing whether a regulation is *ultra vires*, that constitutional issues--including the preservation and maintenance of the constitutionally appropriate state/federal balance--should be avoided when an otherwise acceptable construction of a statutory provision is possible.[10] The FWS's overexpansive interpretation of "harm" raises serious constitutional issues which can be avoided through a narrower and more appropriate construction of the word "harm"--such as that construction adopted by the court of appeals in this case.

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[9] *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947): "[T]he historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress."

[10] "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *New York v. United States*, 112 S.Ct. 2408, 2408 (1992).

C. THE CONSTITUTIONAL ISSUES: STATE SOVEREIGNTY AND SELF-GOVERNMENT.

The proper balance between the federal government and the states is preserved textually by the Tenth Amendment[11] and the Guarantee Clause,[12] and is embedded in the inherent structure of the Constitution.[13] As declared in *Texas v. White,* 7 Wall. 700, 725 (1869):

> [T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

By constituting a federal government of limited powers, while reserving "the powers not delegated to the United States, nor prohibited by it" to the states and the people, the Constitution established a framework in which the states retained "substantial sovereign authority." *Gregory v. Ashcroft,* 501 U.S. 452, 457 (1991).[14] If the states or the people have not conferred a power upon Congress, then *a fortiori* a federal agency cannot assume that power in derogation of the Tenth Amendment.

The Guarantee Clause is predicated on the proposition that state governments are accountable to their citizens with respect

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[11] U.S. CONST. amend. X (the "Tenth Amendment"): "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[12] U.S. CONST. art. IV, § 4 (the "Guarantee Clause"): "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ."

[13] *See, Nevada v. Hall,* 440 U.S. 410, 433 (1979) (Rehnquist, J., joined by Burger, C.J., dissenting).

[14] In *New York,* 112 S.Ct. at 2417 (1992), the Court stated:

> If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.

to fundamental decisions about how to allocate, control, and use resources and define property rights.[15] A state's "republican form" of government is diminished when its ability to make decisions is fettered, constrained, or overridden by a federal agency acting *ultra vires*.[16] The vitality of the Guarantee Clause was renewed in *New York v. United States*, 112 S.Ct 2408, 2432-2433 (1992) in which the Court acknowledged the suitability of the Guarantee Clause to protect states from an over-intrusive federal government.[17]

The control of elected officials by the electorate and their accountability to the citizens who entrust them to office is the *sine qua non* of a republican form of government.[18] "Since at least the eighteenth century, political thinkers have stressed that a republican government is one in which the people control their

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[15] *See Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 762 (1982) ("*FERC*").

[16] Of course, pursuant to the Supremacy Clause and assuming a basis for exercising a power (*e.g.*, the Commerce Clause or the Spending Clause), Congress can intrude into state sovereignty and override state law. The requirement, however, is that Congress must plainly state that it intends to do so.

[17] In *New York*, the Court ruled that the Low-Level Radioactive Waste Policy Act did not violate the Guarantee Clause because under the Act "[t]he States . . . retain the ability to set their legislative agendas; state government officials remain accountable to the local electorate." *New York*, 112 S.Ct. at 2433.

[18] Professor Tribe has strongly urged the revitalization of the Guarantee Clause's protection of state governments:

> *[The Guarantee Clause] might plausibly be invoked in support of the proposition that the Constitution recognizes in the National Government a duty, running directly "to every State in this Union" rather than to individuals, to respect the state's most fundamental structural choices as to how its people are to participate in their own governance* . . . When Justice O'Connor observed, in her powerful dissent in [*FERC*], that "federalism enhances the opportunity of all citizens to participate in representative government," [456 U.S. at 789.] . . . she may have hit upon an important link between the tacit postulate of state sovereignty and the textual guarantee of republican government.

Laurence Tribe, AMERICAN CONSTITUTIONAL LAW 397-398 (2d. ed. 1988) (emphasis added).

rulers [citing J. Locke, *Second Treatise of Government*, § 149]."[19]

Preserving state sovereignty and federalism is not, however, an abstract "states' right" goal. Rather the Court has recognized that such preservation is critical to protecting the rights and powers of citizens. As the Court stated in *New York*, 112 S.Ct. at 2431 (citations and quotation marks omitted):

> The Constitution does not protect the sovereignty of the States . . . as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself. Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power . . . [A] healthy balance of power between the States and the federal government will reduce the risk of tyranny and abuse from either front.

Reflective of the citizens' rights, values, desires, and concerns, Texas and its local governments have erected a system of laws which defines and protects the property of their citizens and have established a comprehensive resource management system, including land using planning, zoning, environmental protection, resource protection, and water rights protection, control, and allocation. This system has been diminished by the FWS and its overexpansive interpretation of "harm."

The hobbling of a state government's abilities to protect the property and self-governing rights of its citizens results in a diminishment of the state's republican form of government.

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[19] Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 23 (1988) (hereinafter "*Guarantee Clause and State Autonomy*"), citing The Federalist No. 39 (James Madison). In *New York*, the Court relied on Professor Merritt's article for the following proposition: "Accountability [of state officials to the public] is . . . diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation." 112 S.Ct. at 2424.

Federal abrogation, furthermore, of a state's property protection and regulatory framework constitutes a violation of the Guarantee Clause--unless Congress clearly intended to supersede the state's laws.[20] Without clear and manifest intention by Congress, a federal agency cannot convert a sovereign state into a mere subordinate "field office" of the federal government. *See New York* 112 S.Ct at 2434.

D. The Language And Legislative History of the ESA Clearly Indicate That Congress Deferred to State Law in Areas Constitutionally Reserved to the States.

As originally passed, the ESA was very deferential to the states, apparently due to the constitutional concerns identified above and the historic pre-eminence of state law in regulating wildlife, natural resource management, and private land use. Congressional deference is manifested in ESA §§ 4(d), 6(c)(1)(E)(ii), and 6(g)(2)(B), which make state law controlling in many instances in determining when a "take" of a listed wildlife species has occurred. The FWS's view that the ESA, through the simple inclusion of the word "harm," allows FWS to regulate land use and displace state authority is incompatible with this Congressional deference to state law.

Moreover, there are strong indications in the legislative history of the ESA that Congress chose not to displace state authority in the area of regulating private land use. Senator Williams' bill, as introduced, defined "take" to include the "destruction, modification, or curtailment of [a listed species']

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[20] Professor Merritt explained:

> [T]he words of the guarantee clause suggest a limit on the power of the federal government to infringe state autonomy: the citizens of a state cannot operate a republican government, "choos[ing] their own officials" and "enact[ing] their own laws," if their government is beholden to Washington. [The Guarantee Clause], therefore, may be read as a promise to preserve the state autonomy necessary to foster republican government.

Guarantee Clause and State Autonomy at 25.

habitat or range."[21] The Senate Committee (when it reported S. 1983) deleted the "habitat modification" language entirely.[22] The Senate Report accompanying S. 1983 stressed that the states have the lead "in protecting domestically endangered species," with the federal roles largely being to appropriate funds "to acquire lands" and support the states.[23] Thus, it appears that the Senate deleted the "habitat modification" language out of respect for state regulatory authority over private land uses. More particularly, Congress' intent with respect to deferring to states with respect to water issues is abundantly clear:

> It is further declared to be the policy of Congress that Federal Agencies shall cooperate with State and Local Agencies to resolve water issues in concert with conservation of endangered species.

16 U.S.C. § 1531(c)(2).[24]

II. THE FWS'S "HARM" REGULATION INTRUDES INTO TWO PRINCIPAL AREAS OF TRADITIONAL STATE AUTHORITY: THE CONTROL, ALLOCATION, AND USE OF WATER RESOURCES, AND LAND USE PLANNING.

Under the federal system established by the Constitution, state and local governments enact, maintain, and enforce laws

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[21] *Endangered Species Act of 1973: Hearings on S. 1592 and S. 1983 Before the Subcomm. on Environment of the Senate Comm. on Commerce,* 93d Cong., 1st Sess. 27 (1973) ("1973 Senate Hearings").

[22] The reported version defined "take" as "harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct," much as the ESA does today. S. Rep. No. 307, 93d Cong., 1st Sess. 14 (1973). "Harm" was added as part of a package of undebated Senate floor amendments.

[23] S. Rep. No. 307 at 2-5, *reprinted in* 1973 U.S.C.C.A.N. 2991-93.

[24] Congressional concern for states is further exemplified in ESA § 11(g)(1)(A), 16 U.S.C. § 1540(g)(1)(A). This provision does not allow a citizen suit to be brought against a state in violation of the Eleventh Amendment. *See Blatchford v. Native Village of Noatak,* S.Ct. 2578, 2584-2585 (1991); *Dellmuth v. Muth,* 491 U.S. 223, 227-228 (1989). In *Hess v. Port Authority Trans Hudson Corporation,* 115 S.Ct. 394, 400 (1994), the Court recognized that "current Eleventh Amendment jurisprudence emphasizes the integrity retained by each state in our federal system . . . ."

protecting private property. "'Property interests, of course, are not created by the Constitution, but rather by existing rules or understandings that stem from an independent source such as state law." *Delaware v. New York*, 113 S. Ct. 1550, 1557 (1993) (citation and quotation marks omitted). Real property law, furthermore, has been recognized by the Court as a matter of special concern to the states. *Fidelity Federal Savings. & Loan Association v. de la Cuesta*, 458 U.S. 141, 153 (1982).

Certain police powers are reserved to the states and protected by the Constitution. State and local governments are particularly responsible and entitled to enact, maintain, and enforce laws governing the use of land and water, such as laws regarding zoning,[25] land use planning,[26] and natural resource management.[27]

The "harm" regulation substantially intrudes into two areas in which Congress and the courts have consistently and pointedly deferred to state law: resource management (including the definition, protection, use, and control of private property), and the use, control, and allocation of water. Paradoxically, the result of FWS's overexpansive interpretation of "harm" is that the mere listing of species results in a resource management system controlled by a cadre of federal bureaucrats, scientists, and technicians--without any necessity to designate critical habitat as the ESA requires.[28]

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[25] "[Z]oning laws and their provisions . . . are peculiarly within the province of state and local legislative authorities." *Warth v. Seldin*, 422 U.S. 490, 509 n. 18 (1975).

[26] *See Dolan v. City of Tigard*, 114 S.Ct. 2309, 2317 (1994). *See also, California Coastal Commission v. Granite Rock Company*, 107 S.Ct. 1419, 1431 (1987) (state land use planning law applicable to federal land).

[27] With respect to state authority over resources in general, *see Sporhouse v. Nebraska ex rel. Douglas*, 458 U.S. 963, 964 (1982) (Rehnquist, J., joined by O'Conner, J. dissenting) (states have traditional authority over resources within their respective boundaries which are essential to the lives and well-being of their respective citizens). With respect to deference to state water law, *see* Section II.A. *infra*. With respect to wildlife protection, *see* Section I.D. *supra*. *See also, Toomer v. Witsell*, 334 U.S. 385, 402 (1948).

[28] FWS Director Molly Beattie publicly stated, with respect to the designation of critical habitat for a protected species, the protected golden-cheeked warbler, "[t]he critical-habitat designation doesn't add anything to

A. THE FWS "HARM" REGULATION UPSETS THE STATE/FEDERAL BALANCE BY INTRUDING INTO STATE WATER LAW.

Water law--the determination of allocation, ownership, and control of water resources--has long been established as an area of traditional state authority and has long received extraordinary deference from both Congress and the courts. *California v. United States,* 438 U.S. 645, 653 (1978). Congress has oftentimes preserved the states' right to determine which systems of law to follow. *Id.* at 658.

Texas follows the "rule of capture" for groundwater. *Houston & T.C. Railway Co. v. East*, 81 S.W. 279 (Tex. 1904). The rule of capture has several important implications pertaining to this case. First, it means groundwater is the private property of the surface owner subject to the surface owner's "capture" of the resource. Second, it is a rule of no liability.[29] Third, the rule of no liability extends to groundwater pumping that affects springflow relied upon by surface appropriators.[30]

The case for federal deference to state water law is even stronger in Texas than in other western states. Federal lands do not comprise a large percentage of property owned in Texas. More than 96 percent of the land in Texas is privately owned. Furthermore, Texas has few of the massive federal water projects that have been the source of so much of the Supreme Court's jurisprudence in the area of water.

The following are examples of how the FWS "harm" regulation is being applied to displace long-standing Texas water law. These applications unavoidably infringe upon private property rights protected by Texas' property law framework, and

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cheeked warbler, "[t]he critical-habitat designation doesn't add anything to the constraints on the average landowner." "Agency defends plan for songbird habitat," *San Antonio Express News,* July 27, 1994, at 1.

[29] That is, adjoining landowners do not have a cause of action for damages or injunction resulting from the pumping of underground water. *See e.g., City of Sherman v. Public Utility Commission*, 643 S.W.2d 681 (Tex. 1983).

[30] *Pecos County WCID v. Williams,* 271 S.W.2d 503 (Tex. Civ. App.--El Paso 1954, *writ ref'd n.r.e.*).

also infringe on Texas' self-governmental rights to determine how its water resources will be allocated, controlled, and used.

1. The Edwards Aquifer: Federal Regulation of State Water Law Through the "Harm" Definition.

Sierra Club v. Babbitt,[31] currently before the federal court in the Western District of Texas represents an effort to impose federal regulation pursuant to the ESA over pumping in the *entire* Edwards Aquifer region of Central Texas.[32] The district court held that when springflows at the Comal and San Marcos Springs fed by the Aquifer drop below a specific rate, endangered fountain darters are "taken" in violation of ESA § 9.[33]

The court has threatened several times to impose pumping limits on the Edwards Aquifer unless Texas develops a regulatory system to limit pumping to whatever extent is necessary to avoid "takes," even in a repeat of the drought of record.[34] Most recently, on March 6, 1995, the court stated that it "has no alternative under the law [the ESA] but to do whatever is necessary to keep the Comal and San Marcos springs flowing."[35] The court further indicated that it believes that it has the authority to order Texas to implement a pumping reduction plan adopted by the court, and that it will do so, should Texas fail to do so on its own.

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[31] *Sierra Club v. Babbitt*, No. MO-91-CA 069 (W.D. Tex. May 26, 1993) (amended order) ("*Sierra Club I*").

[32] The Edwards Aquifer, which extends over 3600 square miles in six counties in Central Texas, feeds the San Marcos and Comal Springs ("Springs"), where the fountain darter and four other listed species are found. *Sierra Club v. Babbitt,* 995 F.2d 571, 573 (5th Cir. 1993) ("*Sierra Club II*"); *Sierra Club I*, Amended Findings of Fact and Conclusions of Law ¶¶ 5, 24, 25.

[33] *Sierra Club I,* Amended Findings of Fact and Conclusions of Law ¶ 81. According to the Fifth Circuit, the FWS was found guilty of the "takes." *Sierra Club II,* 995 F.2d at 574.

[34] The plan must also limit pumping to whatever extent is necessary to avoid any appreciable reduction in the likelihood of the species' survival and recovery and any appreciable diminution of the value of critical habitat for the survival and recovery of any listed species. *Sierra Club I,* at 6 (W.D. Tex. May 26, 1993) (amended order).

[35] *Sierra Club I*, Order on the Sierra Club's Second Motion for Additional Relief, at 2, 8 (W.D. Tex. March 16, 1995).

In response to the court's 1993 "urgings" and in order to avoid the FWS "blunt axes," the Texas legislature created the Edwards Aquifer Authority ("EAA") in 1993 to manage the Edwards Aquifer. Because the implementation of the act creating the EAA was objected to under Section 5 of the Voting Rights Act, the federal court appointed a monitor in February 1994[36] to gather and evaluate "information necessary to allow the court to take appropriate action to prevent violations of the [ESA]."

This application of the "harm" regulation in the Edwards Aquifer litigation has sweeping ramifications. It has the potential to negate an entire body of Texas groundwater law, to eviscerate the authority of several local groundwater conservation and regulatory bodies, and erode the vested property rights of those individuals who must rely on the Edwards Aquifer for water to drink, irrigate crops, or run businesses. As noted above, Texas follows the rule of capture with respect to groundwater. By holding that groundwater pumping causes a "take" under ESA § 9, the *Sierra Club* court possibly subjects the pumpers (in addition to the FWS) to civil and criminal liability for the very same act that, under Texas law, is not only legal, but falls under a private property rule of no liability. *See City of Sherman v. Public Utility Commission,* 643 S.W.2d 681 (Tex. 1983); *Pecos County WCID v. Williams,* 271 S.W.2d 503 (Tex. Civ. App. - El Paso 1954, *writ ref'd n.r.e.*) (no liability for landowners whose pumping of underground water affected flow of spring relied on by adjacent landowner).

The potential reach of the "harm" regulation over water use and land regulation in this case is truly astonishing.[37] The

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[36] *Sierra Club I,* Order Appointing Joe G. Moore, Jr. as Monitor, at 1-2 (W.D. Tex. Feb. 25, 1994).

[37] The American Bar Association's Section of Natural Resources, Energy, and Environmental Law Journal stated moreover:

> [T]he *Sierra Club* suit presents a situation in which the connection between the activity and the taking [under the ESA] is extremely remote. The suit literally would have FWS regulate groundwater withdrawal by an irrigator based on conditions at a spring located almost one hundred miles away from that irrigator's activity. Moreover, the irrigator's activity alone is not what is causing those conditions at the spring to occur, but rather it is the cumulative effect of a regionwide activity. That activity is not associated with direct destruction of habitat;

Edwards Aquifer is the major source of water for over one million people: It supplies water to San Antonio and other cities, as well as to farmers, ranchers, businesses, and military installations.[38] These individuals, businesses, and cities must either decide to stop pumping water, at great cost and political detriment to themselves, or face civil and criminal sanctions in the future.[39]

The threat of a court-run regulatory system is increasing. Under the FWS interpretation of "harm," FWS and the court have the authority to impose restrictions on private and public property immediately, rather than continuing to press Texas to do it for them. In addition, the FWS could bring a civil or criminal action,

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rather, it is the result of the general sheltering and welfare of a regional population (*i.e.*, the supply of water to residences and businesses).

If the ESA was intended to cover natural resource management issues such as those raised in the Sierra Club lawsuit, one has to question what situations the ESA could not cover. For example, if it could be shown that acid rain in northeastern forests resulting from midwest power plant production is resulting in the depletion of endangered species habitat, could FWS regulate power plant practices? . . . Another scenario might involve an interstate water dispute in which one state argues that an upstream state is diverting so much water that an endangered species' habitat is threatened. One's mind does not have to wander far to come up with similar examples of how FWS could use the ESA as a resource management tool on a regional or even national scale.

"Phase Three of the ESA: Using Endangered Species Protection as a Natural Resource Management Tool," NATURAL RESOURCES & ENVIRONMENT JOURNAL, Winter 1992, at 39 (emphasis added).

[38] *Sierra Club I*, Findings of Fact and Conclusions of Law ¶¶ 16, 17.

[39] Texas agrees with the arguments made by the State of Arizona in its amicus brief that the FWS "harm" regulation is constitutionally suspect as an overbroad construction of a criminal statute in that it criminalizes lawful land uses on nonfederal lands. Therefore, Texas supports Arizona in its analysis that traditional insistence on clear statutory statements by Congress is a prerequisite to criminalization of ordinary activities. The Edward Aquifer case indicates the problems of an overly broad interpretation of "harm": it is unclear which of the thousands of pumpers of the Edwards Aquifer would be criminally culpable for the purported "takes" of the fountain darter, or upon what principled basis a court could convict, or the federal government could prosecute pumpers throughout the entire Edwards Aquifer region.

or the Sierra Club could bring a citizen suit, against those who are pumping water from the Aquifer.

2. PROPOSED LISTING OF THE BARTON SPRINGS SALAMANDER AND THE ARKANSAS RIVER SHINER: FURTHER FWS PLANS TO MANAGE STATE WATERS.

A 1994 FWS proposal to list the Barton Springs salamander as endangered stated that designating Barton Springs (the only place the salamander is found) as critical habitat "would actually be detrimental to conservation efforts . . . because it would promote the misconception that the Barton Springs are the only areas important to the conservation of the species."[40] The springs are fed by an aquifer, and the FWS believes that it has the authority to regulate activities--primarily urban development[41]--that might affect the quality and amount of the water in the aquifer. The area of land that provides water to the aquifer that feeds the Barton Springs is 354 square miles.[42]

On August 3, 1994, the FWS proposed to list the Arkansas River shiner (a fish) as an endangered species.[43] In that proposal, the FWS implied that groundwater uses in three states would have to be modified to preserve the species.[44] The FWS recognized that groundwater is an extremely important source of water in Texas, Kansas, and Oklahoma. FWS noted that withdrawals of groundwater in the Canadian River Basin in Texas were as much as thirty-three times higher than the annual natural recharge in 1980.[45] The FWS concluded that under current conditions of groundwater usage, suitable habitat to support Arkansas River shiner populations is nonexistent. In other words, the FWS declared that those three states would have to reform current water usage. Drastic changes to surface water uses would also be demanded by the FWS.

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[40] 59 Fed. Reg. 7968, 7977 (Feb. 17, 1994).

[41] *Id.* at 7971, 7977.

[42] *Id.* at 7969.

[43] 59 Fed. Reg. 39532.

[44] *Id* at 39535.

[45] *Id.*

C. THE FWS OVEREXPANSIVE DEFINITION OF "HARM" RESULTS IN FEDERAL LAND USE REGULATION THAT EFFECTIVELY PREEMPTS STATE AND LOCAL LAND USE PLANNING.

The FWS's overexpansive interpretation of the word "harm" is producing an unprecedented shift in resource management power from the states and local governments to an unelected and unresponsive federal bureaucracy. FWS rests its resource management scheme on the word "harm." This term was added by a technical amendment to the ESA in 1982, without debate. It is inconceivable that so innocuous an addition could justify the pervasive resource management scheme spawned by FWS's "harm" definition.

Pursuant to its interpretation of "harm," FWS has acted to regulate state and private land in Texas. In particular, it prohibits landowners from undertaking ordinary, otherwise legal activities not directed against endangered or threatened species. This prohibition is extensive--it affects land in almost all of Texas' 254 counties.

It is impossible for landowners to know the full *geographical extent* of the prohibition, however, because FWS rarely delineates the habitat of listed species. Moreover, FWS does not limit its oversight to land that contains habitat, delineated or not; it relies on its regulatory definition to restrict land use hundreds of miles away from habitat, on occasion, if it feels that use of that land might--however indirectly--affect protected habitat.

Nor is it possible to predict what *kinds of uses* of land are prohibited. Under its interpretation of "harm," FWS need not show that a land use actually results in physical injury to an individual member of a species; to the FWS, the modification of habitat is itself enough to demonstrate that a "take" has occurred. The regulatory definition of "harm" presumes that proscribed injury to wildlife may occur by any activity that "significantly impair[s] essential behavioral patterns." 50 C.F.R. § 17.3. Only FWS, however, knows what habitat modifications are "significant" enough to come under that prohibition. It is clear, moreover, that FWS's interpretation of "harm" does not require any showing of actual death or injury to an individual of a listed species, despite protestations on brief by FWS that it does.

As a result, landowners use their land at the risk of possible civil and criminal sanctions under the ESA. Their only recourse is to seek an "incidental take" permit from FWS under ESA § 10(a). Such permits are rare, seldom available to individuals, and often very expensive.

This system of prohibitions and permits amounts to a pervasive land regulation program not contemplated by Congress in passing the ESA. Congress has provided for a system--ESA § 5 federal land purchases--that would pay landowners for their land if necessary to protect listed species. FWS has reversed that system, by requiring landowners to pay for the use of their own land. The FWS potentially unbounded regulation of land use based on the word "harm" is contrary to the intent of Congress and raises serious constitutional and federalism issues.

1. The FWS Land Use Regulation System Applies To Land Throughout Texas and, for the Most Part, Its Boundaries Are Undefined.

FWS has listed 42 species of fish and wildlife as endangered or threatened whose habitat is at least in part within Texas.[46] FWS has proposed listing another four species of fish and wildlife in Texas,[47] and it has identified another eleven for which it believes it has sufficient information to support such a proposal.[48] FWS has many more listings under consideration: It is considering another 155 species in Texas for which it has

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[46] *See* FWS, *Threatened and Endangered Species of Texas* (1992). FWS regulations list another four species in Texas: the Louisiana black bear, the Mexican spotted owl, the Coffin Cave mold beetle, and the Bone Cave harvestman. 50 C.F.R. § 17.11, at 93,105,120,121 (1994). FWS added the southwestern willow flycatcher to the list of endangered species on February 27, 1995. 60 Fed. Reg. 10693.

[47] *See* 59 Fed. Reg. 7968 (Feb. 17, 1994) (proposal to list Barton Springs salamander as endangered); 59 Fed. Reg. 35674 (July 13, 1994) (proposal to list jaguar, which does not currently live in Texas but may cross border from Mexico, as endangered); 59 Fed. Reg. 39532 (Aug. 3, 1994) (proposal to list Arkansas River shiner as endangered); 59 Fed. Reg. 39532 (Aug. 3, 1994) (proposal to list cactus ferruginous pygmy-owl as threatened in Texas).

[48] 59 Fed. Reg. 58982 (Nov. 15, 1994) (list of animals FWS is reviewing for possible addition to its list of endangered and threatened species).

information indicating that a proposal to list is "possibly appropriate."[49]

The species already listed as endangered and threatened are found in most of the counties in Texas. Taking into account the migratory route of the whooping crane adds considerably more counties. In all, 210 of the 254 counties in Texas are already covered to some extent.[50] The vast majority of these species are on private and state land, since the vast majority of land in Texas is private or state-owned.[51] The federal government owns less than two percent of Texas land--a far lower percentage than elsewhere in the West.

While it is possible to know in general where these species are found in Texas, it is usually impossible for a landowner to know whether his or her land is regulated by FWS, for two reasons. First, *FWS does not delineate the habitat* of most listed species. Although the ESA requires a species' "critical habitat" to be designated to the maximum extent determinable and prudent at the same time it is listed,[52] FWS usually does not designate critical habitat when the species is listed or afterwards. For example, FWS has designated critical habitat for only 10 species found in Texas.[53]

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[49] *Id.* FWS states that "persuasive data on biological vulnerability and threat are not currently available to support proposed rules." *Id.*, at 58983.

[50] The August 1992 FWS study provides, for each species, a map highlighting the counties that include range of the species, including the migratory path of the whooping crane.

[51] Indeed, the majority of all listed species in the United States are on nonfederal land. In a December 1994 report, the General Accounting Office stated, "Over 90 percent (712 of 781) of the listed species [including plant species] in the United States for which the Service had responsibility as of May 10, 1993, have some or all of their habitat on nonfederal lands." General Accounting Office, *Species Protection on Nonfederal Lands* 4 (1995). Of the 359 listed animal species, 247 (about 69 percent) have over 60 percent of their total habitat on nonfederal lands. *Id.*, at 5.

[52] 16 U.S.C. § 1533(a)(3).

[53] The FWS's reluctance to designate critical habitat is understandable in light of the public outrage ignited by the leaked proposal to designate about 800,00 acres throughout Central Texas as critical habitat this past summer. The use of its overexpansive "harm" definition (as determined by biologists

For the other listed species in Texas, which do not have designated critical habitat, FWS gives only general information on the species' location, such as merely listing the counties in which the species is found.[54] Such information is of little or no use to landowners who need to know whether their land may be affected by the FWS prohibition on habitat modification. Nor is it usually possible for landowners to make such a determination themselves. In effect, FWS puts the burden on landowners to prove that their land does not contain habitat.

The second reason why the geographical boundaries of the FWS regulation as to a listed species are unclear is that FWS's application is *not limited to habitat*, whether or not it is delineated. FWS believes that it may regulate any activity that might affect habitat, even if the activities and the habitat are hundreds of miles apart. Regulation is not therefore limited to actual habitat, but has been applied by FWS to also reach a vast amount of additional land in Texas.[55]

2. THE FWS LAND REGULATION SYSTEM DOES NOT MAKE CLEAR WHAT USES OF LAND ARE PROHIBITED; IN PARTICULAR, USES MAY BE PROHIBITED WITHOUT ANY EVIDENCE THAT THEY RESULT IN PHYSICAL INJURY TO AN INDIVIDUAL MEMBER OF A SPECIES.

The reach of the FWS's regulation of land is extended further because the FWS "harm" interpretation does not require that the purportedly prohibited activities cause physical injury in fact to an individual member of a listed species. Under the FWS interpretation of "harm," habitat modification, without more, equals a prohibited take.

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and technicians) against landowners is easier than engaging in the public process for designating critical habitat.

[54] *See* FWS, *Threatened and Endangered Species of Texas* (1992).

[55] Examples of this broad regulation have already been given: The proposed listing of the Barton Springs salamander would affect 354 square miles of watershed for the aquifer that feeds Barton Springs. The judge in the *Sierra Club* case pending in the Western District of Texas has repeatedly threatened to impose aquifer-wide pumping regulations on the basis of alleged modifications to spring-fed habitat literally a hundred or more miles away from pumpers who would be affected by such an order.

In its brief, Petitioners dispute this. They repeatedly state that the definition of "harm" prohibits only habitat modification that "actually kills or injures wildlife." Petitioners admit, however, that this language does not limit the regulatory definition to actions that cause physical injury to an individual member of a listed species.[56] The language Petitioners emphasize does not, however, narrow the scope of the definition in any way.

The substance of the FWS regulatory definition is in the second sentence, which states, in effect, that "harm" equals "habitat modification." The second sentence makes clear that habitat modification may "injure[] wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3. Therefore, to establish "harm"--and thus a "take"--FWS need only show that essential behavioral patterns may be "significantly impair[ed]" by habitat modification.

This language is remarkably vague. In reality, it is clear that FWS generally ignores the vague and redundant terms and simply interprets the definition as equating "harm" with "habitat modification." Thus, for example, the clearing of cedar trees by a landowner has been bootstrapped into a "take" of a golden-cheeked warbler whether or not one is actually killed or injured and the pumping of Edwards Aquifer groundwater by a farmer or rancher is bootstrapped into a "take" of a fountain darter located one hundred or more miles away.

Statements of the FWS in Texas, and actions taken by it in Texas, confirm this assertion. For instance, in a presentation to a committee of the Texas legislature, Mr. Sam Hamilton, State Director for FWS in Texas, stated: "When the golden-cheeked warbler was listed in 1990, it received the full protection of the ESA *and that included protecting the habitat it depends on.*"[57]

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[56] *Petitioners Brief*, at 6-7. "Nothing in the regulation indicates that the injury, of whatever type, is to an individual, as opposed to some indefinite injury to the species in general."

[57] *House Committee on Natural Resources Subcommittee on Mitigation of Property Rights* (August 9, 1994) (statement of Sam Hamilton) (copy on file with Texas House of Representatives Archives, Tape 1, Side A) (emphasis added).

Mr. Hamilton admitted that available uses of property decreased because of the mere listing of the warbler.

Mr. Hamilton's statements are based on FWS's expansive interpretation of "harm" definition. Once a species is listed, the use of property--public or private--within the species' range, *or potential range*, is immediately and presumptively affected.[58] There is nothing in the ESA to suggest that this was intended by Congress, especially where it results in so pervasive a displacement of property rights and traditional state police powers.

a. The Golden-Cheeked Warbler: Federal Land Use Restrictions Imposed on Private Property by Application of the "Harm" Regulation.

FWS's treatment of the habitat of the golden-cheeked warbler, which it designated as endangered in 1990, presents an example of the FWS overexpansive interpretation.[59] The golden-cheeked warbler is found in 33 Texas counties in Central Texas.[60]

Since 1990, FWS has sent dozens of letters to landowners in Central Texas (the "bird letters") informing them that using their property in various ways would be a "take" of the warbler.[61]

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[58] Secretary Babbitt stated to a United States Senate subcommittee investigating the National Biological Survey Act of 1993 that property in the range or potential range is "under a cloud that cannot be lifted" until accurate scientific data is available: "Good data will remove uncertainty and in the vast majority of cases, increase property values by showing conclusively there is no problem." Testimony before Senate Subcommittee, *Endangered Species Act--Incentives to Encourage Conservation by Private Land-Owners: Hearings Before Subcomm. on Environment and Natural Resources of the Committee on Merchant Marine and Fisheries House of Representatives*, at 25, 103rd Cong., 1st Sess. 65 (1993).

[59] 55 Fed. Reg. 18844 (May 4, 1990) (emergency listing); 55 Fed. Reg. 53153 (Dec. 27, 1990) (final listing).

[60] FWS, *Threatened and Endangered Species of Texas* B7 (1992).

[61] These letters have been issued and not rescinded despite the statement by Secretary Babbitt to then-Governor Ann Richards in a September 22, 1994 letter that "[m]ost warblers live on rocky slopes. Since most agricultural and building activity does not occur on rocky slopes, those activities should not affect warbler conservation." The letter is attached in the Appendix at 6a.

Several of the bird letters are attached at Appendix 9a-39a.[62] The usual pattern of the letters is as follows:

--they state that the property would[63] or could[64] provide suitable habitat for the golden-cheeked warbler;[65]

--they sometimes state that the property is part of a larger area that contains habitat occupied by the warbler[66] or that warblers have been sighted nearby,[67] but almost never that warblers have actually been sighted on the property itself or are known to occupy habitat on the property;

--they state that clearing or development-related activities would[68] or could[69] constitute a "take" of the warbler; and

--they state that the activities would require FWS authorization through an ESA Section 10(a) permit[70] or they "recommend" that clearing or other similar activity be discontinued.[71]

The bird letters thus equate modifying habitat *per se* with a "take." They do not state that the land use will result in death or injury to warblers, or even that it will "significantly impair essential behavioral patterns." On the contrary, when the letters

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[62] Ten of the fourteen attached letters are from 1994, three are from 1993, and one is from 1991.

[63] Letters Appendix, 11a, 13a, 15a, 27a, 35a.

[64] Letters Appendix 21a, 23a.

[65] Other formulations include "prime habitat" for the warbler (Letter 9a); habitat likely to be occupied by the warbler (Letter 33a); and vegetation that is possibly occupied by the warbler (Letters 19a, 25a).

[66] Letters 35a, 37a.

[67] Letters 13a, 19a, 30a, 37a.

[68] Letters 13a, 15a, 23a, 27a, 35a.

[69] Letters 30a, 37a.

[70] Letters 13a, 15a, 23a, 27a.

[71] Letters 17a, 19a, 25a, 33a. Another form is to recommend that authorization under the ESA be secured before any development. Letters 30a, 35a, 37a. Letter 9a "respectfully urges" that clearing be discontinued, but only after describing the ESA's civil and criminal sanctions and informing the landowner that the matter is under investigation by the FWS Law Enforcement Office.

add to the above structure, they usually state only that "disturbing" habitat constitutes "harm,"[72] or that "disrupting" the breeding and/or foraging activities of the warbler constitutes a take.[73] FWS thus ignores its own statement, at the time it promulgated the "harm" definition, that it chose the word "impair" rather than "disrupt" "to limit harm to situations where a behavioral pattern was adversely affected and not merely disturbed on a temporary basis with no consequent injury to the protected species."[74]

b. The Piping Plover: Federal Land Use Restrictions Imposed on State Property by Application of the "Harm" Regulation.

The piping plover was listed as an endangered species on December 11, 1985.[75] Its listing has impacted the value of land legal title to which is held by the Texas for the benefit of school children supported by the Texas Permanent School Fund ("PSF"). The PSF is managed by the Texas General Land Office ("GLO"), a state agency.

In 1984, after consultations with the Texas Parks and Wildlife Department and FWS, the GLO issued a seismic exploration permit for land in the Lower Laguna Madre (a bay) in Kenedy County, Texas. FWS required the state to investigate whether the piping plover occupied the area. Despite the fact that no piping plovers were found in the area, FWS insisted that additional measures be undertaken, to avoid impacts to *potential* habitat. The added requirements proved so burdensome and potentially expensive that all exploration efforts were abandoned. The result is a potentially large loss of revenue, present and future, to the PSF for the benefit of Texas schoolchildren, and a denial of a state agency's ability to meet its statutory obligations.

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[72] Letters 17a, 21a.

[73] Letters 19a, 25a, 33a. Other letters state only that the warbler is "sensitive" to factors associated with residential development. Letters 13a, 15a, 27a, 30a, 35a, 37a.

[74] 46 Fed. Reg. 54748, 54750 (Nov. 4, 1981).

[75] 50 Fed. Reg. 50733 (Dec. 11, 1985).

3. THE PERMIT PROCESS IS LENGTHY AND EXPENSIVE, AND IN EFFECT REVERSES THE LAND ACQUISITION PROGRAM CREATED IN THE ESA.

Landowners subject to the FWS resource management scheme have only one recourse: seek a ESA § 10(a) "incidental take" permit.[76] The applicant must submit a habitat conservation plan for the species.[77] This process is necessarily expensive, since it requires hiring legal and technical consultants and preparing lengthy applications.[78] The process is also lengthy and has only resulted in 31 permits as of June 1994.[79] The FWS's "harm" regulation expands the "incidental take" permit program in a fundamental way not contemplated by the ESA: the permit process is triggered in situations where there has been no actual physical harming of a protected species, and it has not been determined that the activities would actually "kill" or "injure' a listed species.

In addition, the permit process imposes requirements not contemplated by the ESA. Although ESA § 9 does not prevent private landowners from takes of listed plants, the conservation plan must, *inter alia*, ensure that any listed plants located on the tract in question are not jeopardized.

The most striking aspect of the permit process is how FWS uses it to overturn the land acquisition program created by the ESA § 5. ESA §5 provides that landowners be paid for the use of their land if its acquisition by the federal government is necessary to protect listed species. In implementing its "habitat modification is harm" regulation, on the other hand, FWS often "extorts" substantial concessions from the applicant before it approves the ESA § 10(a) permit. FWS has in effect reversed the program actually created by Congress.

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[76] In order to secure an ESA § 10(a) permit, the landowner must submit a "habitat conservation plan" ("HCP"). 16 U.S.C. § 1539(a)(20(A).

[77] ESA § 10(a)(2)(A), 16 U.S.C. § 1539(a)(2)(A).

[78] *See* 50 C.F.R. § 17.22(b)(1) (application requirements).

[79] General Accounting Office, *Species Protection on Nonfederal Lands* 8 (1995).

CONCLUSION

Under *Chevron* step two analysis, review of a challenged agency regulation falls under the prudential "deference to the administrative agency" standard. Because, however, the "harm" regulation adopted by FWS results in federal intrusion into areas of traditional state authority, the plain statement rule supersedes this deference. ESA § 9 contains no authority supporting the notion that Congress intended to include habitat modification within the prohibition entailed in ESA § 9 or that Congress intended deep intrusions into the sovereign power of the states. In sum, the ESA provides no indication that Congress intended to shift vast resource management powers and rights (such as water resource management and land use planning) from the states to a federal bureaucracy.

The "harm" regulation should, furthermore, be measured against the language of the ESA and Congressional intent in a manner to avoid constitutional issues such as the federalism and state sovereignty issues raised by Texas. The FWS's interpretation of "harm" places the weight of an enormous *de facto* federal resource management scheme on a single word, "harm," added without debate through a technical amendment to a ten-word definition. Congress did not intend this single word to authorize such a scheme.

For these reasons, FWS interpretation of the term "harm" should be held invalid and the Court of Appeals decision should be affirmed.

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ATTORNEY GENERAL OF TEXAS

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SAM GOODHOPE
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PAUL TERRILL
ASSISTANT ATTORNEY GENERAL

EUGENE MONTES
ASSISTANT ATTORNEY GENERAL

APPENDICES

PRIVATE GROUPS ENDORSING THIS BRIEF

Associated Milk Producers

The Association is the nation's largest dairy farmer cooperative. Its members produce twelve percent of the nation's milk supply.

Association of Texas Soil and Water Conservation Districts

The Association is a nonprofit organization organized for the purpose of conducting educational, scientific, charitable, and religious work concerning the conservation, maintenance, improvement, development and use of land, soil, water, trees, vegetation, fish and wildlife, open spaces, and other renewable natural resources.

Exotic Wildlife Association

The Association is comprised of businessmen and ranchers joining to protect and promote the rights of private ownership as well as develop and expand non-native breeding throughout the United States.

Independent Cattlemen's Association of Texas

The Association is made up of ranchers, cattlemen, feed dealers, equipment suppliers and others involved in Texas agriculture. Its members are working to help rural Texas grow and to protect the rights of Texas agriculture.

Livestock Marketing Association of Texas

The Association represents the interests of livestock auctions, order buyers and livestock dealers throughout Texas.

Lumbermen's Association of Texas

Lumbermen's is a trade association for retail lumber dealers.

National Land Rights Association

The organization represents landowners, scientists, and natural resource professionals dedicated to the conservation of our natural resources through the protection of private property rights.

Rio Grande Valley Sugar Grower's

The organization is a cooperative of various sugar cane growers within the Rio Grande Valley dedicated to improving the overall efficiency of their industry

Riverside and Landowners Protection Coalition

The Coalition is a non-profit corporation whose members own and operate rural land throughout Texas. The group is committed to educating the general public on private property issues and working state and federal agencies in preserving the privacy of private property in Texas.

South Texas Cotton And Grain Association

The Association represents farm growers in the Coastal Bend, Upper Coast and Winter Garden regions of Texas.

Southern Rolling Plains Cotton Growers Association

The Association represents various cotton producers in the Southern Rolling Plains of Texas.

Southwest Association

The Association represents various hardware retail stores and farm equipment retail dealers throughout Texas.

Southwestern Public Service Company

Southwestern is an investor-owned electric utility serving approximately one million persons in parts of southwestern Kansas, the Oklahoma Panhandle, the Panhandle and South Plains of Texas, and eastern New Mexico.

Take Back Texas

The association is a grassroots organization dedicated to protecting the private property rights and freedoms of landowners throughout Texas.

Texas and Southwestern Cattle Raisers Association

The Association represents the interests of various cattle raisers throughout Texas and the Southwest.

Texas Agriculture Industries Association

The Association is a non-profit entity representing the plant food and crop protection industries in Texas.

Texas Agricultural Aviation Association

The Association is a small business trade group of individuals and families engaged in the aerial application profession.

Texas Agricultural Cooperative Council

The Council is a trade association representing the cooperatively-organized agribusiness firms operating in Texas.

Texas Agri-Women

The association is a non-profit, non-partisan organization primarily composed of farm and ranch women, agri-business women and consumers working together to develop and promote agriculture.

Texas Association of Dairymen

The Association represents the interests of various dairy families throughout Texas for the purpose of providing the best possible environment for the dairy industry.

Texas Association of Nurserymen

The organization is a trade association representing the wholesale production, retail garden center, landscape professional and allied supplier segments of the nursery industry in Texas.

Texas Cattle Feeders Association

The Association represents the interests of individuals and business entities involved in the cattle feeding industry in Texas, Oklahoma, and New Mexico.

Texas Cotton Ginners' Association

The Association is composed of active cotton ginners throughout Texas and is dedicated to assisting the industry in addressing mutual challenges

Texas Cotton Producers

The organization represents the interests of various cotton and grain producers throughout Texas.

Texas Farm Bureau

The Bureau is an independent, non-governmental, voluntary organization of farm and ranch families united for the purpose promoting and protecting the interests of the agricultural community.

Texas Farmer's Union

The Union is a non-profit organization composed of family farmers and ranchers promoting agriculture.

Texas Food Processors Association

The organization is a non-profit trade association representing companies engaged in the processing of food products in Texas. It is dedicated to support, promote, and encourage education in all aspects of the food industry in Texas.

Texas Forestry Association

Texas Forestry Association is a non-profit trade association of landowners, logging contractors, professional foresters, and processing mills dedicated to the conservation and wise utilization of our forest resources in East Texas.

Texas Grain Sorghum Association

The Association represents the interests of sorghum producers and agribusiness representative who are working to protect the viability of American agriculture.

Texas Justice Foundation

The Foundation is a non-profit corporation that provides free legal representation in cases involving the protection of individual rights and/or cases that seek to limit government to its proper role.

Texas Poultry Federation

The association represents the interests of several segments of the poultry industry in Texas including the Texas Broiler Council, Texas Egg Council, Texas Poultry Improvement Association, Texas Allied Poultry Association, and the Texas Turkey Federation.

Texas Rice Producers Legislative Group

The organization represents rice producers in the state of Texas who have joined together to work for the betterment of the Texas rice industry.

Texas Wheat Producers Association

The Association represents various farmers that produce wheat on the land they own, rent or lease in 220 of Texas' 254 counties.

Texas Wildlife Association

The Association in a non-profit entity which serves as an advocate for the rights of wildlife, wildlife managers, landowners, and hunters. It is dedicated to the maintenance, management, and enhancement of wildlife habitat on private land.

LETTER TO ANN RICHARDS FROM BRUCE BABBITT

THE SECRETARY OF THE INTERIOR
WASHINGTON
September 22, 1994

Honorable Ann W. Richards
Governor of Texas
Austin, Texas 78711

Dear Governor Richards:

I appreciated receiving your recent letter suggesting ways in which the Department could work more effectively with the State of Texas and its citizens to meet the goals of the Endangered Species Act.

Like yourself, I recognize the success the Act has had in Texas as well as in the rest of the country.

I am also convinced that effective implementation of the act is consistent with the traditional rights and responsibilities of property owners. I believe, however, that the built-in flexibility of the Act has not been routinely used in a way that gives private landowners the security and certainty they need when making important land-use decisions. Too often, the Federal Government has failed to pursue creative conservatism solutions with landowners, making the listing of species a first and last resort.

Your persuasive advocacy of the concerns of ranchers and farmers in Texas has been a valuable contribution to us as we seek ways to meet the goals of the Act. Your letter contained several constructive proposals that I instructed my staff to analyze immediately. Some of those points need further review. However, I believe that several of your ideas exemplify the new flexibility we need in enforcing the Act.

As you are aware, I have personal knowledge of the State and local government efforts to create conservatism initiatives protecting the warbler. The Fish and Wildlife Service's work thus far clearly indicates that , if the appropriate habitat conservation plans are implemented within a reasonable period of time, the designation of critical habitat for the warbler will be neither necessary nor prudent because it will provide no net benefit to the species. I have therefore instructed the U.S. Fish and Wildlife Service to cease work on warbler critical habitat designation. Instead, Service personnel will direct their energies towards working with the State, local governments, property owners and other interested citizens to establish habitat conservation plans that protect both our natural heritage and our economic potential.

I agree with you that normal agricultural and ranching activities in Texas have little impact on golden cheeked warbler habitat.

Assertions that protection of the warbler in Texas would have a significant negative impact on such practices are wrong. The Department testified recently before a joint hearing of the State Legislature's Natural Resources Committee and said unequivocally that if land has been plowed or farmed for years, it is not warbler habitat. While the Act does not give us the authority to exempt specific land-use practices, as a practical matter traditional ranching and farming activities will not hinder warbler conservation. Regrowth cedar that has invaded cleared fields is also not habitat, and can be cleared without concern. Most warblers live on rocky slopes. Since most agricultural and building activity does not occur on rocky slopes. those activities should not affect warbler conservation.

I believe the Department has been remiss in failing to give adequate guidance on this matter, which has led to an abundance of misinformation on the topic. I have asked U.S. Fish and Wildlife Service Director Mollie Beattie to work

closely with the State to issue such guidance as soon as possible before the end of the year. You should know that in July, the Service changed its policy to ensure that when a listing occurs, the listing package will include a document specifying activities that will not be affected by the listing.

I also agree with your proposal to examine and recommend ideas for changes to the implementation of the Act in Texas. I have asked Director Beattie to work with your office and affected constituents to develop a process designed to achieve this goal.

Making the flexibility in the Act work will require input from affected citizens, State and local governments. The State of Texas has continually offered constructive advice and input into our process. In fact, Texas has become a national leader in establishing a working relationship with the Federal Government on specific endangered species issues. I will continue to welcome any information from Texas concerning listed or candidate species, including evidence to support a petition that would delist a species.

Be assured that future information provided by Texas on any species will receive serious consideration.

Your personal involvement has been key to developing solutions for these natural resources issues. I look forward to a continued working relationship with both you and the Texas Legislature.

Sincerely,

s/ Bruce Babbitt

LETTERS TO CENTRAL TEXAS LANDOWNERS

UNITED STATES
DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
Ecological Services
Stadium Centre Building
711 Stadium Drive East, Suite 252
Arlington, Texas 76011

February 20, 1991

Mr. & Mrs. Mike Igua
P.O. Box 4748
Lago Vista, TX 78645

Dear Mr. & Mrs. Igua:

It has come to our attention that clearing of a strip of woodland has recently occurred on a tract of land located south of FM 1431 in the vicinity of Lago Vista, Texas. We understand that you are one of the joint owners of the property. Information available to us indicates that this property supports prime habitat for the federally-listed endangered golden-cheeked warbler. Destruction of habitat of an endangered species may constitute a "take" of that species as defined by the Endangered Species Act, which prohibits "take" of a federally-listed species unless the "take" is incidental to otherwise lawful activity and a permit in compliance with the Act has been obtained. In this case, a permit under Section 10(a) of the Act would apply. Information on the Section 10(a) permit process is enclosed.

Destruction of endangered species habitat, without a permit, that results in "take" of a federally-listed endangered species could be held to be a violation of the act and could expose a violator to the criminal penalties provided for under Section 11(b)(1) of the Act or to the civil penalties provided for under Section 11(a)(1) of the Act. Section 11(b)(1) provides for a fine of not more that $50,000 or imprisonment up to one year, or both. Section 11(a)(1) permits assessment of up to $25,000 as a civil penalty for each violation.

This matter is currently under investigation by Special Agent Alex Hasychak of the Fish and Wildlife Service Law Enforcement Office in San Antonio and by personnel of this office. If you are indeed an owner of the property in question, we respectfully urge that you cease any further land clearing activities and contact Alex Hasychak at (512) 229-5412 or Joe Johnston of this office at (817) 885-7830 for additional information on compliance of such activities with the Endangered Species Act.

Sincerely,

Robert M. Short
Field Supervisor

Enclosure

cc: Law Enforcement, FWS, San Antonio, TX
Regional Director, FWS, Albuquerque, NM (FWE/HC)
Regional Solicitor, USDI, Tulsa, OK

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

Marge Krueger
6208 Shadow Mountain Drive
Austin, Texas 78731

Dear Ms. Krueger:

This responds to our telephone conversation of June 7, 1993, requesting that this office reevaluate the following property for its suitability as habitat for federally listed threatened or endangered species:

> Lot in Jester Point, Phase I, or 7101 Foxtree Cove, Austin, Travis County, Texas

We have reviewed the information you provided as well as other available information concerning the potential of the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates.

We believe this property would be suitable habitat for the federally listed endangered golden-cheeked warbler and/or the cave invertebrates. We believe that clearing or development-related activities of this acreage would constitute a "take" as defined by Endangered Species Act (Act). The Act prohibits the "take" of a federally listed species unless the "take" is incidental to an otherwise lawful activity and a section 10 (a)(1)(B) permit under the Act has been obtained. Therefore, our biological evaluation of

development on the subject lot and compliance with the Act remains unchanged.

We appreciate your concern for endangered species and your desire to comply with the Endangered Species Act. This response is intended to assist you in such compliance. You are ultimately responsible for compliance with all laws, and this letter does not exempt you from complying with current or future federal, state, regional, or local development requirements. If you wish to discuss this further, please contact Alma Barrera at 512-482-5436.

Sincerely,

Sam D. Hamilton
State Administrator

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

June 24, 1993

Phil Frazier
Horizon Environmental Services, Inc.
P.O. Box 162017
Austin, Texas 78746

Dear Mr. Frazier:

This responds to your letter, dated May 24, 1993, requesting this office review the following property for its suitability as habitat for federally listed threatened or endangered species:

> 0.321 acres located on Lakeview Drive in Comanche Trail Subdivision, Travis County, Texas.

We have reviewed the information you provided as well as other available information concerning the potential for the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates. We believe this property would not provide suitable habitat for the black-capped vireo and the cave invertebrates, but would provide suitable habitat for the golden-cheeked warbler.

Our records indicate that golden-cheeked warblers have been observed on the periphery of this property. Current biological information indicates the warbler is sensitive to several factors associated with residential development, including increases in noise levels, predators, human activity

in nesting areas, and other disturbance factors. We believe that clearing or development-related activities of this area, would constitute a "take" as defined by the Endangered Species Act (Act). The Act prohibits "take" unless it is incidental to an otherwise lawful activity and been authorized under section 7 or section 10(a)(1)(B) of the Act. Therefore, construction in this area would require authorization under the Act.

We appreciate your concern for endangered species and your desire to comply with the endangered Species Act. This response is intended to assist you in such compliance. You are ultimately responsible for compliance with all laws, and this letter does not exempt you from complying with current or future federal, state, regional, or local development requirements. If you wish to discuss this further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

Sam D. Hamilton
State Administrator

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

December 3, 1993

Keith E. Young
KEY Group Engineering
3701 Bee Caves Road, Suite 102
Austin, Texas 78746

Dear Mr. Young:

This responds to your letter, dated August 31, 1993, requesting this office review the following property for its suitability as habitat for federally listed threatened or endangered species:

> Part of 25.4 area tract located 4.1 miles from 1431 off Lime Creek Road, Travis County, Texas

We have reviewed the information you provided as well as other available information concerning the potential for the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates. We believe this property would provide suitable habitat for the golden-cheeked warbler, the black-capped vireo and/or the cave invertebrates.

The subject tract is part of a large tract occupied by golden-cheeked warbler, black-capped vireo and/or the cave invertebrates. Additionally, areas that are biologically necessary for the continued existence of a species may not be continuously occupied by that species. Current biological

information indicates the warbler and vireo are sensitive to several factors associated with residential development, including increases in noise levels, predators, human activity in nesting areas, and other disturbance factors. We believe that clearing or development-related activities of this area, would constitute a "take" as defined by the Endangered Species Act (Act). The Act prohibits "take" unless it is incidental to an otherwise lawful activity and been authorized under section 7 or section 10(a)(1)(B) of the Act. Therefore, construction in this area would require authorization under the Act.

We appreciate your concern for endangered species and your desire to comply with the Endangered Species Act. This response is intended to assist you in such compliance. You are ultimately responsible for compliance with all laws, and this letter does not exempt you from complying with current or future federal, state, regional, or local development requirements. If you wish to discuss this further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

/s/ Jana Grote

Sam D. Hamilton
State Administrator

Enclosure

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

January 13, 1994

Patrick Noack
2000 Yaupon Valley Road
Austin, Texas 78746

Dear Mr. Noack:

It has come to our attention that clearing and construction activities associated with residential development are occurring on a 23-acre tract located off Yaupon Valley Road in Westlake Hills, Travis County, Texas. Information received from the Travis County Tax Appraisal District indicates that you are the owner of this property.

The Fish and Wildlife Service (Service) has reviewed this property for endangered species concerns in a letter, dated June 10, 1992, (see enclosed copy). In this letter, based on biological surveys provided by Horizon Environmental Services and other information available at that time, our agency advised that development of this tract would require a permit for "incidental taking" under section 10(a)(1)(B) of the Endangered Species Act (Act). Further development of this property would be prohibited under section 9 of the Act. We are providing information on this section 10(a)(1)(B) permitting process for your information.

Provisions of the Act prohibit unauthorized take of endangered species listed under the Act. "Take" is defined as activities that harass, harm, pursue, hunt, shoot, wound, kill,

trap, capture, or collect, or attempt to engage in such a conduct. "Harm" in this definition includes the disturbance or destruction of habitat occupied by the species or necessary for its recovery. Activities that could affect the warbler include clearing, construction, or change in flora or fauna of areas in or adjacent to habitat.

The Service recommends no further development activities occur on this lot and that all construction and vegetation clearing stop immediately. Failure to stop these activities immediately could result in a violation of the Act and possible criminal or civil actions that could result in fines and/or imprisonment.

Should you have any questions regarding the determination on this property, or would like to have a meeting concerning this property and the section 10(a)(1)(B) permitting process, please contact Bob Simpson at 512/482-5436.

Sincerely,

/s/ Joseph E. Johnston

Sam D. Hamilton
State Administrator

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

January 13, 1994

Jerri Garner
25613 River Fern Court
Leander, Texas 78641

Dear Ms. Garner:

This letter is in reference to recent clearing activities on the property across River Fern Court from your horse stable operations near Leander, in Williamson County , Texas. This property supports vegetation that is possibly occupied by the federally listed endangered golden-cheeked warbler. According to our files, golden-cheeked warblers have been sighted on adjacent properties in similar habitat, and are very likely present on your property close to the area that has been cleared.

If the activities taking place on the subject site are in any way disrupting the breeding and/or foraging activities of the federally protected golden-cheeked warbler, these activities would constitute a "take" of listed species. Take of listed species is prohibited under section 9 of the Endangered Species Act (Act) and must be avoided or authorized under section 7 or section 10 of the Act.

The term "take" means to harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct. "Harm" in this definition of "take" in the Act means an act which actually kills or injures wildlife. Such

act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. "Incidental taking," authorized under section 7 or 10 of the Act, means any taking otherwise prohibited, if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

Based on aerial photographs, and other information available to this office, we recommend that clearing activities on the property be discontinued and a biological survey be performed by qualified biologists to determine if this habitat is currently being utilized by golden-cheeked warblers. This would help you, and our office, determine if further development of this site would require authorization under the Act. Please see the appropriate enclosures for minimal survey requirements for the golden-cheeked warbler.

If you have further questions regarding the ecology of the golden-cheeked warbler, of the Act, please contact Bob Simpson of my staff at (512) 482-5436.

Sincerely,

/s/ Jana Grote
/s/ Joseph E. Johnston

Sam D. Hamilton
State
Administrator

cc: Jean Nance

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

January 13, 1994

Austin Americana Enterprises
Rex Bohls
1301 S IH-35
Austin, Texas 78741

Dear Mr. Bohls:

It has come to our attention that clearing and construction activities associated with residential development are occurring on a 473 acre tract of land known as the Friendship Ranch in Hays County, Texas. Information received from the Hays County Tax Appraisal District indicates that you are the owner of this property.

The Fish and Wildlife Service reviewed this property in a letter to the Doug Hodge Company on October 16, 1991, for endangered species concerns (see enclosure). In that letter we stated that, based on aerial photographs and other data available to this office, the property could provide suitable habitat for the federally listed and protected golden-cheeked warbler (*Dendroica chrysoparia*). We also included information regarding minimal survey (warblers) using the property.

Provisions of the Act prohibit unauthorized take of endangered species listed under the Act. "Take" is defined as activities that harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such a conduct. "Harm" in this definition includes the disturbance or destruction of habitat occupied by the species or necessary

for its recovery. Activities that could affect the warbler include clearing, construction, or change in flora or fauna of areas in or adjacent to habitat.

We have not received any information, since that correspondence, to change our determination that the subject property could provide suitable habitat for the warbler. If there are warblers present on this property, development could require a permit for "incidental taking" under section 10(a)(1)(B) of the Endangered Species Act (Act). We are providing information on the section 10(a)(1)(B) permitting process for your consideration and urge you to contact this office for further assistance on how to comply with the Act.

Should you have any questions regarding this property, or would like to schedule a meeting concerning this property and the section 10(a)(1)(B) permitting process, please contact Bob Simpson at 512/482-5436.

Sincerely,

/s/ Joseph E. Johnston

Sam D. Hamilton
State
Administrator

Enclosure

cc: Alex Hasychak, FWS, Special Agent, Law Enforcement

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

January 25, 1994

Lee Sherrod
Horizon Environmental Services, Inc.
P.O. Box 162017
Austin, Texas 78716

Dear Mr. Sherrod:

This responds to your fax, dated September 17, 1993, requesting that this office evaluate the following property for its suitability as habitat for federally listed threatened or endangered species:

> Two tracts on River Hills Road off FM 2244 (Bee Caves Road), Austin, Travis County, Texas

We have reviewed the information on the 1991 and 1993 surveys you provided as well as other available information concerning the potential for the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates. We believe that this property would not provide suitable habitat for the black-capped vireo or the cave invertebrates, but could provide suitable habitat for the golden-cheeked warbler.

Because of sightings on or adjacent to these tracts, we believe that clearing or development related activities on this acreage would constitute a "take" as defined by Endangered Species Act (Act). The Act prohibits the "take" of a federally listed species unless the "take" is incidental to an

otherwise lawful activity and section 7 or section 10(a)(1)(B) permit under the Act has been obtained. Therefore, development of this acreage would require authorization under the Act.

Thank you for providing pertinent information regarding this evaluation. This response is intended to assist you in such compliance. You are ultimately responsible for compliance with all laws, and this letter does not exempt you from complying with current or future federal, state, regional or local development requirements. If you wish to discuss this further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

/s/ Jana Grote

Sam D. Hamilton
State Administrator

Enclosure

cc: City of Austin, Conservation & Environmental Department
City of Austin, Electric Department
Jim Nuckles, Travis County Tax Appraisal District

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

April 7, 1994

This letter is in reference to recent clearing activities on your property on FM 1340 near Hunt, in Kerr County, Texas. This property supports vegetation that is possibly occupied by the federally listed endangered golden-cheeked warbler. According to our files, golden-cheeked warblers have been sighted on adjacent properties in similar habitat, and are possibly present on your property close to the area that has been bulldozed.

If the activities taking place on the subject site disrupt the breeding and/or foraging activities of the federally protected golden-cheeked warbler, these activities would constitute a "take" of listed species. Take of listed species is prohibited under section 9 of the Endangered Species Act (Act) and must be avoided or authorized under section 7 or section 10 of the Act.

The term "take" means to harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct. "Incidental taking", authorized under section 7 or 10 of the Act, means any taking otherwise prohibited, if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

Based on aerial photographs, and other information available to this office, we recommend that clearing activities on the property be discontinued and a biological survey be performed by qualified biologists to determine if this habitat

is currently being utilized by golden-cheeked warblers. This would help you, and our office, determine if further development of this site would require authorization under the Act. Please see the enclosure for minimal survey requirements for the golden-cheeked warbler.

If you have further questions regarding the ecology of the golden-cheeked warbler, or the Act, please contact Bob Simpson of my staff at (512) 482-5436.

Sincerely,

/s/ Joseph E. Johnston

Field Supervisor

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

April 14, 1994

Lee Sherrod
Horizon Environmental Services, Inc.
P.O. Box 162017
Austin, Texas 78716

Dear Mr. Sherrod:

This responds to your letter dated March 4, 1994, requesting this office review the following property for its suitability as habitat for federally listed threatened or endangered species:

> Painted Bunting Subdivision, Austin, Travis County, Texas

We have reviewed the information you provided as well as other available information concerning the potential of the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates. Based on current biological information, we do not believe that this property would provide suitable habitat for the black-capped vireo or the cave invertebrates, but would provide habitat for the golden-cheeked warbler.

Your bird survey indicates that two golden-cheeked warblers were observed in the canyon. Current information indicates the warbler is sensitive to several factors associated with residential development, including increases in noise levels,

predators, human activity in nesting areas, and other disturbance factors. Therefore, we believe that clearing or development-related activities on Lots 6-13, would constitute a "take" as defined by the Endangered Species Act. The Act prohibits the "take" unless it is incidental to an otherwise lawful activity and section 10(a)(1)(B) permit under the Act has been obtained. Therefore, construction of residences on these lots would require authorization under the Act.

However, construction on Lots 1-4 and 14-15 (drawing enclosed) would not require authorization under the Act if the following conservation measures are incorporated in the construction.

1. Remove only those trees and shrubs necessary for construction of driveway, septic tank and house.

2. Confine the development activities on the front 200 feet of the lot.

3. Use only native plant species for landscaping.

4. Confine exterior construction activities so that it occurs outside the breeding season for the golden-cheeked warbler (breeding period is from March 1 through August 1), so as to avoid disruption of breeding behavior.

We believe that destruction of the habitat located beyond the front 200 feet of the lot could result in a "take" of the endangered golden-cheeked warbler and thus, require authorization under the Act.

We appreciate your concern for endangered species and your desire to comply with the Act. This response is intended to assist you in such compliance. However, you are ultimately responsible for compliance with all laws, and this letter cannot assure you complete protection from any future liability or exempt you from any current or future federal,

state, regional or local development requirements. If you wish to discuss this matter further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

Field Supervisor

Enclosure

cc: City of Austin, Conservation & Environmental Department
City of Austin, Electric Department
Jim Nuckles, Travis County Tax Appraisal District

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

September 23, 1994

Fran & Larry Collmann
9911 Anderson Mill Road
Austin, Texas 78750

Dear Mr. & Mrs. Collmann:

This responds to your letter, dated September 19, 1994, requesting this office re-evaluate the 13.942 acres located near Spicewood Springs Road and Loop 360 off White Cliff Dr., Austin, Travis County, Texas property. We have re-evaluated the new information you provided.

As stated in our letter June 1, 1994, our records indicate that golden-cheeked warblers have been sighted on the western, southern and eastern boundaries of this property. Mr. Lee Sherrod's letter to you of June 13, 1994, indicated the possibility of black-capped vireos in the area. Current information indicates the warbler and vireo are sensitive to several factors associated with residential development, including increases in noise levels, predators, human activity in nesting areas, and other disturbance factors. Therefore, we believe that clearing or development-related activities on the majority of this tract, could constitute a "take" as defined by the Endangered Species Act. The Act prohibits "take" unless it is incidental to an otherwise lawful activity and has been authorized under section 10(a)(1)(B) of the Act. We recommend that authorization under the Act be secured prior to any development.

However, we also said, there may be a possibility of building a single house on the 13.942 acres without constituting "take" if the following conditions are observed. We wish to reiterate that this property is very close to habitat that is occupied by the golden-cheeked warbler and/or black-capped vireo. To avoid harassment (a possible "take" violation) of the species that may occur in the area, we wish to recommend the following conservation measures:

1. Construction of only one single family home on the northeast portion of the property, the area which is already cleared.

2. The driveway be constructed in the already cleared roadway.

3. Exterior construction activities on this property not occur between March 1 and August 1.

4. Remove only the trees that are needed for construction of the house and septic field.

5. Use only native plants and grasses for landscaping.

6. Ensure that all clearing and construction operations are consistent with current practices of the Texas Forest Service to prevent the spread of oak wilt.

7. Prohibit the use of pesticides, herbicides and fertilizers.

If these conservation recommendations are not followed, then we believe a take could occur and recommend obtaining authorization under section 10(a)(1)(B) or section 7 of the Endangered Species Act. Section 10(a)(1)(B) permit procedures are enclosed.

Thank you for providing pertinent information to help re-evaluate this property. If you wish to discuss this matter further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

/s/ Jana Grote

Field Supervisor

Enclosure

cc: City of Austin, Conservation & Environmental Department
City of Austin, Electric Department
Jim Nuckles, Travis County Tax Appraisal District

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

January 13, 1994

Glenn Williams and Terry Wynn, Partners
P.O. Box 64138
Lubbock, Texas 79464

Gentlemen:

This letter is in reference to recent vegetation clearing activities on 611.208 acres of your property located near Spanish Pass Road and Tower Road in Kendall County, Texas. This property supports vegetation that is likely to be occupied by the federally listed endangered golden-cheeked and/or black-capped vireo.

If the development activities on the subject site are in any way disrupting the breeding and/or foraging activities of the federally protected golden-cheeked warbler and/or black-capped vireo, these activities could constitute a "take" of listed species.

The Endangered Species Act (Act) prohibits the "take" of federally-listed species unless the "take" is incidental to otherwise lawful activity and a section 10(a)(1)(B) permit under the Act has been obtained. "Take" is defined as harass, harm, pursue, hunt, shot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

We recommend that clearing activities on the property be discontinued and you contact Alma Barrera for additional

information on compliance of such activities with the Act at (512) 482-5436.

Sincerely,

/s/ Joseph E. Johnston

Field Supervisor

cc: Regional Director, Region 2
Solicitor, Department of the Interior, Tulsa, OK
Fish and Wildlife Service, Law Enforcement, San Antonio, TX

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

June 9, 1994

Stan & Donna Buck
305 Golden Oaks Drive
Georgetown, Texas 78628

Dear Mr. & Mrs. Buck:

This responds to your letter, dated March 23, 1994, requesting this office to review the following property for its suitability as habitat for federally listed threatened or endangered species:

> Lot 8, Lake Georgetown Estates II, located on County Road 262, Georgetown, Williamson County, Texas

We have reviewed the information you provided as well as other available information concerning the potential of the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates. We believe that this property would not provide suitable habitat for the black-capped vireo or the cave invertebrates, but would provide habitat for the golden-cheeked warbler.

The subject lot is part of a block of habitat occupied by the golden-cheeked warbler. Areas that are biologically necessary for the continued existence of a species may not be continuously occupied by that species. Current biological

information indicate the warbler is sensitive to several factors associated with residential development, including increases in noise levels, predators, human activity in nesting areas, and other disturbance factors. We believe that clearing or development-related activities in this area, would constitute a "take" as defined by the Endangered Species Act (Act). The Act prohibits the "take" unless it is incidental to an otherwise lawful activity and has been authorized under section 10(a)(1)(B) of the Act. We recommend that authorization under the Act be secured prior to any development. Procedures for the section 10(a)(1)(B) permit process are enclosed.

We appreciate your concern for endangered species and your desire to comply with the Endangered Species Act. This response is intended to assist you in such compliance. You are ultimately responsible for compliance with all laws, and this letter does not exempt you from complying with current or future federal, state, regional or local development requirements. If you wish to discuss this matter further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

Field Supervisor

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

September 22, 1994

Lee Sherrod
Horizon Environmental Services, Inc.
P.O. Box 162017
Austin, Texas 78716

Dear Mr. Sherrod:

This responds to your letter, dated June 28, 1994, regarding the re-evaluation of the HE Brodie tract, located Barton Creek Loop 360, Lamar and Ben White Blvd., Austin, Travis County, Texas.

Our records indicate that golden-cheeked warblers have been observed along the Barton Creek greenbelt adjacent to this property and some observations along the property line. The subject tract is part of a large tract occupied by golden-cheeked warblers. Additionally, areas that are biologically necessary for the continued existence of a species may not be continuously occupied by that species. Current biological information indicates the warbler is sensitive to several factors associated with development, including increases in noise levels, predators, human activity in nesting areas, and other disturbance factors.

We believe that clearing or development-related activities on part of this property (the water quality buffer and transition zones), could constitute a "take" as defined by the Endangered Species Act (Act). The Act prohibits "take"

unless it is incidental to an otherwise lawful activity and has been authorized under section 10(a)(1)(B) of the Act.

As discussed during our meeting of July 12, we believe some development can occur outside the City of Austin water quality buffer and transition zones, 800 feet from the middle of Barton Creek, without constituting "take" if the following conditions are observed.

1. Exterior construction activities within 1000 feet from the middle of the creek not occur between March 1 and August 1.

2. Remove only trees that are needed for construction.

3. Use only native plants and grasses for landscaping.

4. Ensure that all clearing and construction operations are consistent with current practices of the Texas Forest Service to prevent the spread of oak wilt.

If these conservation recommendations are not followed, then we believe a take could likely occur and we recommend obtaining authorization under section 10(a)(1)(B) or section 7 of the Endangered Species Act.

We appreciate your concern for endangered species and your desire to comply with the Act. If you wish to discuss this matter further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

/s/ Jana Grote

Field Supervisor

Enclosure

cc: City of Austin, Environmental & Conservation Services Dept.

City of Austin, Power & Light

Jim Nuckles, Travis County Tax Appraisal District

UNITED STATES DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
POST OFFICE BOX 1306
Albuquerque, N.M. 87103

August 19, 1992

In Reply Refer To:
Region 2/RD

Chairman John Hall
Texas Water Commission
1700 North Congress Avenue
Austin, Texas 78711

Dear Chairman Hall:

The United States Fish and Wildlife Service (Service) commends the efforts of the Texas Water Commission (TWC) to protect and ensure proper management of the limited water resources of the Edwards Aquifer (Aquifer). The TWC's proposed Water Management Plan (Plan) is a major and positive step forward by the State of Texas to resolve a long-standing water crisis that threatens public health and safety, an entire region's economy, and various ecological resources.

The Service has completed a careful review and evaluation of the TWC's proposed plan. We have determined that if the modifications outlined below are made, your plan could increase protection and assurances of flows at San Marcos and Comal Springs, and therefore could provide a sound basis for resolving endangered species issues.

You have asked the Service to provide a careful review of the TWC plan. Taking into consideration the amount of

water now present in the Aquifer, the TWC's hydrologic simulations, as well as our hydrologist's evaluation of droughts in the region, we believe that for the next 20+ years there is a high probability of uninterrupted flow at San Marcos and Comal Springs if your proposed Plan, subject to our recommended changes below, is implemented. Based on this review and incorporation of the recommended changes, the Service supports the proposed TWC Comprehensive Water Management Plan for the Edwards Aquifer.

However, our analysis indicates that even with full implementation of the Plan, there is still the possibility that some "taking" of endangered species may occur. To ensure compliance with the Endangered Species Act and address the possibility for "takings" of endangered species, we recommend that the State of Texas, or an appropriate regional management agency, apply for an incidental take permit from the Service. The Habitat Conservation Plan (HCP) that would accompany such an application should be designed to address the potential for lawful "incidental takings" of endangered species. Based on current data, the following provisions would be required as part of the HCP:

- Initially, direct pumpage from the Aquifer is to be limited, in the aggregate, to no more than 450,000 acre-feet per calendar year.

- Within 10 years, direct pumpage from the Aquifer shall be reduced by 50,000 acre-feet to 400,000 acre-feet per calendar year.

- In order to protect flows at San Marcos and Comal Springs, a special drought management plan must be developed and implemented during extreme drought. Specifically, the drought management plan must reduce direct pumpage from the Aquifer to a rate of 350,000 acre-feet per year at any

time the water level in the J-17 index well in Bexar County falls below 625 feet msl.

- TWC may allow additional withdrawals of "interruptible or (surplus) water supplies when levels at the J-17 index well are above 665 feet msl. However, such withdrawals should be limited to 88,000 acre-feet to assure that spring flows are not adversely affected during critical drought conditions. Also, allocations of such interruptible water supply should provide for the diversion of at least one-half of the water downstream of the springs and associated critical habitat areas, rather than directly from the aquifer.

- All wells used for domestic and livestock purposes should be registered with TWC, or an appropriate regional management agency, to enable the monitoring of their cumulative impact on the Aquifer.

- Maintain moratorium on new wells until the State or local rules go into effect.

- The section 10(a) permit length would be 20 years or less.

Also, from the review we've conducted, it is clear that there is a relationship between pumpage from the Aquifer and flows at San Marcos and Comal Springs. Maintenance of springflows are clearly enhanced as direct pumpage from the Aquifer is reduced. Consequently, the Service recommends a study be conducted over the next 5 years to determine the feasibility of various water users diverting 50,000 to 75,000 acre-feet of their Aquifer water withdrawals from some point downstream of the springs and critical habitat areas.

We also encourage other Federal agencies to demonstrate a leadership role in water conservation and the protection of endangered species. The Endangered Species Act (ESA) states ". . . that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act." This requirement applies to all Federal agencies which contribute, directly or indirectly, to the withdrawal of water from the Edwards Aquifer. The Department of Defense, Department of Agriculture, Department of Transportation, Environmental Protection Agency, and Department of Housing and Urban Development are examples of Federal entities that must play a vital role in the protection of endangered species that are dependent upon the Edwards Aquifer.

Again, the Service supports your efforts and believes that the sensitive springs systems will be afforded a significantly higher degree of protection than they now have. We are very excited and encouraged by the progress that you and your colleagues have made toward developing a much needed and long overdue management plan for the Edwards Aquifer. I particularly appreciate your efforts to look at the "big picture" and provide a plan that considers invaluable natural resources such as springflows, instream flows, and flows to the bays and estuaries, as well as consideration for human well-being. We look forward to continuing our work with you in this endeavor to protect the unique ecosystems that depend on the waters of the Edwards Aquifer.

Sincerely,

s/ Michael Spear

Regional Director

Enclosures

cc:

U.S. Senator Lloyd Bentsen
U.S. Senator Phil Gramm
Honorable Henry B. Gonzalez
Honorable Lamar S. Smith
Honorable Albert G. Bustamante
Governor Ann Richards
Sam Hamilton, State Administrator, FWS, Austin, TX
Andrew Sansom, Executive Director, Texas Parks & Wildlife Dept., Austin, TX

SIERRA CLUB LONE STAR CHAPTER

April 15, 1994

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

TO: The Honorable Bruce Babbitt, Secretary
United States Department of the Interior
Office of the Secretary
18th and C Streets, N.W.
Mail Slot #MS6217
Washington, D.C. 20240

All Federal agencies listed on Exhibit A attached to this notice

The City of San Antonio and other individuals and entities that withdraw water from the Edwards Aquifer, some of whom are listed on Exhibit B

The Texas Natural Resource Conservation Commission (TNRCC)

All other Violators (Defined Below)

Re: Notice of Endangered Species Act Violations

Dear Secretary Babbitt, all Federal agencies listed on Exhibit A attached to this notice, the City of San Antonio and other individuals and entities that withdraw water from the Edwards Aquifer including, without limitation, those listed on Exhibit B, the TNRCC, and all other violators:

We am writing on behalf of the Sierra Club and Clark Hubbs to notify each of you, pursuant to Section 11(g)(2)(A)(i) of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1540(g)(2)(A)(i), of violations of the ESA, 16

U.S.C. 1531 et seq., by each of you, and of the Sierra Clubs and Clark Hubbs intent to sue concerning these violations.

Unlawful actions and failures or refusals to act by all of you cause severe overdrafting of the Edwards Underground River, also known as the Edwards (Balcones Fault Zone) Aquifer, San Antonio Region, hereinafter, the Edwards. Overdrafting of the Edwards poses a substantial and imminent threat of jeopardy to the continued existence of endangered and threatened species and to the public health and safety of 1.5 million people. Both the species and the people are dependent on clear, clean natural Edwards water. Overdrafting of the Edwards moves hydrogen sulfide, a hazardous substance, into the fresh water in the Edwards. Overdrafting of the Edwards threatens to poison the Edwards for everyone.

This threat is urgent. Overdrafting has already resulted in takings of endangered species in 1989 and 1990, and according to the largest pumper, San Antonio, threatens to do so again this summer and in 1995 and 1996. Overdrafting has already resulted in jeopardy to endangered species at Comal Springs in 1989 and 1990, and according to San Antonio threatens to do so again in mid-1995 and mid-1996. Overdrafting has already resulted in some movement of bad water, contaminated by hydrogen sulfide, a hazardous substance, in 1956. It threatens to do so again in a repeat of the drought of record, or in a drought less serious than the drought of record but slightly more serious than the droughts of 1984, 1989 and 1990.

This threat requires a vigorous coordinated federal-state-local response, beginning immediately. Michael Spear, Assistant Director of the U.S. Fish & Wildlife Service (USFWS), lead agency in charge of the Edwards species, testified in November 1992 that the Texas legislative session ending May 1993 represented the last chance for a state solution, before the blunt axes of ESA 7 and 9 have to be dropped. That legislative session produced a statute, S.B.

1477 which, according to the State of Texas, is frozen. No federal, state or local entity has a plan adequate to protect endangered species and human water supplies against overdrafting of the Edwards. The States last plan does not come close to protecting these waters, according to an independent mid-1993 review by the University of Texas.

The background facts are set forth in the Findings of Fact and Conclusions of Law entered on February 1, 1993, by the Honorable Lucius Bunton, Senior United States District Judge, in Sierra Club v. Lujan, 1993 WL 151353 (W.D. Tex.), as amended May 26, 1993, appeal dismissed sub. nom. Sierra Club v. Babbitt, 995 F.2d 571 (5th Cir. 1993). A copy is attached as Exhibit C and incorporated by reference in this notice of violation.

The Sierra Club and Clark Hubbs hereby give notice of the following violations:

(1) The Secretary of the Interior and the U.S. Fish & Wildlife Service have violated and are violating ESA 4, 16 U.S.C. 1533, by (a) failure to act on the listing petitions for certain Comal Springs species; (b) failure to designate critical habitat for those species and for the Texas blind salamander; (c) failure to develop recovery plans for the Comal Springs species and/or population and for the Texas blind salamander; (d) failure to implement key provisions of the San Marcos Recovery Plan; and (e) failure to promulgate regulations to protect threatened species against reduction in springflows due to excessive pumping of the Edwards.

(2) The Secretary of the Interior and all Federal Agencies listed on Exhibit A (together, the Federal Violators), including but not limited to the U.S. Fish and Wildlife Service, the U.S. Departments of the Interior, Transportation, Agriculture, Defense, Army and Air Force, the U.S. Defense Base Closure and Realignment Commission, and the Agency for Toxic Substances and Disease Registry, have violated and are violating ESA 7, 16

U.S.C. 1536, by failing to review and utilize their authorities to plan and carry out programs for the conservation of the Edwards, Comal and San Marcos species against reduced springflows due to excessive pumping and by failing to engage in coordinated multi-agency consultation to insure that no actions or activities authorized, funded or carried out by them or by other federal agencies are likely to jeopardize the continued existence of any of the Edwards, Comal and San Marcos species.

(3) The Federal Violators, the TNRCC, and the City of San Antonio and other individuals and entities who withdraw water from the Edwards Aquifer, some of whom are listed on Exhibit B, have violated and are violating ESA 9 by authorizing, funding or carrying out pumping, or by authorizing, funding or carrying out activities that allow, maintain, encourage or increase pumping, from the Edwards to an extent that reduces Edwards levels and Comal and San Marcos springflow rates to below the points at which endangered wildlife are actually killed or injured.

The Sierra Club and Clark Hubbs intend to amend and supplement the Sierra Clubs complaint in Sierra Club v. Babbitt, seeking leave from Judge Bunton for this purpose. The Sierra Club and Clark Hubbs intend to allege violations of ESA Sections 4, 7 and 9 and of other federal statutes, against specific defendants, as set forth in the proposed amended and supplemental complaint, a copy of which is attached as Exhibit D, and incorporated by reference in this notice of violation. The Sierra Club and Clark Hubbs reserve the right to sue others to whom this notice of violation is sent for the violations covered by this notice, in the proposed amended and supplemental complaint or in a future amended and supplemental complaint. In particular, the Sierra Club and Clark Hubbs give notice that they intend, as necessary, to sue pumpers for violations of ESA Section 9 and seek injunctive relief restricting pumping to prevent violations of Section 9. Such relief may be requested as early as this summer.

Excessive pumping jeopardizes both endangered species and San Antonio's and others water supply. In summary, federal, state and local authorities have the power and duty to protect the Edwards against excessive pumping. They have failed and are failing or refusing to carry out their responsibilities. As a result, excessive pumping by San Antonio, the San Antonio military bases, agribusinesses and others imperils the Edwards ecosystem.

The Sierra Club and Clark Hubbs plan to take prompt legal action to obtain judicial remedies for this emergency.

Sincerely,

Ken Kramer, Director
Lone Star Chapter of the
Sierra Club

Stuart Henry
SBN 09484000
202 West 17th Street
Austin, Texas 78701
(512) 479-8125
(512) 479-8269 (fax)

P.M. Schenkkan
SBN 17741500
727 E 26th Street
Austin, Texas 78705
(512) 471-3280
(512) 471-6988 (fax)

Attachments

cc: Governor Ann Richards
TO: Bruce Babbitt, et al.
April 15, 1994
Page PAGE 4

1. U.S. Agency for Toxic Substances and Disease Registry
   By serving David Satcher, Administrator
   1600 Clifton Road, N.E.
   Atlanta, GA 30333

2. U.S. Defense Base Closure and Realignment Commission
   By serving James A. Courter, Chairman
   Rosslyn Metro Center Bldg.
   1700 North Moore Street
   Arlington, VA 22209

3. U.S. Department of Agriculture
   By serving Mike Espey, Secretary
   14th and Independence Avenue, S.W.
   Washington, D.C. 20250

4. U.S. Department of Commerce
   By serving Ronald H. Brown, Sr., Secretary
   14th St. and Constitution Avenue, N.W.
   Washington, D.C. 20230

5. U.S. Department of Defense
   By serving William J. Perry, Secretary
   The Pentagon
   Washington, D.C. 20301

6. U.S. Department of the Air Force
   By serving Sheila E. Widnall, Secretary of the Air Force
   The Pentagon
   Washington, D.C. 20330

7. U.S. Department of the Army
   By serving Togo D. West, Jr., Secretary of the Army
   The Pentagon
   Washington, D.C. 20310

8. U.S. Department of the Navy
   By serving John H. Dalton, Secretary of the Navy
   The Pentagon
   Washington, D.C. 20350

9. U.S. Department of Education
By serving Richard W. Riley, Secretary
400 Maryland Avenue, S.W.
Washington, D.C. 20202

10. U.S. Department of Energy
By serving Hazel R. O'Leary, Secretary
Forrestal Building
1000 Independence Avenue, S.W.
Washington, D.C. 20585

11. U.S. Department of Health and Human Services
By serving Donna E. Shalala, Secretary
200 Independence Avenue, S.W.
Washington, D.C. 20201

12. U.S. Department of Housing and Urban Development
By serving Henry G. Cisneros, Secretary
451 Seventh Street, S.W.
Washington, D.C. 20410

13. U.S. Department of the Interior
By serving Bruce Babbitt, Secretary
18th and C Street, N.W.
Mail Slot # MS6217
Washington, D.C. 20240

14. U.S. Department of Justice
By serving Janet Reno, Attorney General
Tenth Street and Constitution Avenue, N.W.
Washington, D.C. 20530

15. U.S. Department of Labor
By serving Robert B. Reich, Secretary
200 Constitution Avenue, N.W.
Washington, D.C. 20210

16. U.S. Department of State
By serving Warren Christopher, Secretary
2201 C Street, N.W.
Washington, D.C. 20520

17. U.S. Department of Transportation

By serving Federico F. Pena, Secretary
400 Seventh Street, S.W.
Washington, D.C. 20590

18. U.S. Department of the Treasury
By serving Lloyd M. Bentsen, Secretary
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

19. U.S. Department of Veteran Affairs
By serving Jesse Brown, Secretary
810 Vermont Avenue, N.W.
Washington, D.C. 20420

20. Environmental Protection Agency
By serving Carol M. Browner, Administrator
401 M Street, S.W.
Washington, D.C. 20460

21. Farm Credit Administration
By serving Billy R. Brown, Chairman
1501 Farm Credit Drive
McLean, VA 22102

22. Farmers Home Administration
By serving Michael V. Dunn, Administrator
14th Street and Independence Avenue, S.W.
Washington, D.C. 20250

23. Federal Communications Commission
By serving Reed E. Hundt, Chairman
1919 M Street, N.W.
Washington, D.C. 20554

24. Federal Deposit Insurance Corporation
By serving Andrew Hove, Chairman
550 Seventeenth Street, N.W.
Washington, D.C. 20429

25. Federal Emergency Management Agency
By serving James Lee Witt, Director
Federal Center Plaza
500 C Street, S.W.
Washington, D.C. 20472

26. Federal Home Loan Mortgage Corporation
By serving Leland C. Brendsel, Chairman
8200 Jones Branch Drive
McLean, VA 22102

27. Federal Housing Finance Board
By serving the Chairman
1777 F Street, N.W.
Washington, D.C. 20006

28. Federal Labor Relations Authority
By serving Jean McKee, Chairman
607 Fourteenth Street, N.W.
Washington, D.C. 20424-0001

29. Federal Trade Commission
By serving Janet D. Steiger, Chairman
Sixth Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

30. General Services Administration
By serving Roger W. Johnson, Acting Administrator
18th and F Streets, N.W.
Washington, D.C. 20405

31. International Development Cooperation Agency of the United States
By serving J. Brian Atwood, Director
Department of State Building
320 Twenty-first Street, N.W.
Washington, D.C. 20523

32. International Trade Commission
By serving Don E. Newquist, Chairman
500 E Street, S.W.
Washington, D.C. 20436

33. Interstate Commerce Commission
By serving Gail C. MacDonald, Chairman
Twelfth Street and Constitution, N.W.
Washington, D.C. 20423

34. National Labor Relations Board

By serving James M. Stephens, Chairman
1099 14th Street, N.W.
Washington, D.C.
20570

35. Office of Thrift Supervision
By serving Jonathon L. Fiechter, Acting Director
1700 G Street, N.W.
Washington, D.C.
20552

36. U.S. Postal Service
By serving Marvin Runyon, Postmaster General
475 L'Efant Plaza West, S.W.
Washington, D.C.
20260

37. Resolution Trust Corporation Oversight Board
By serving Jack Ryan, Chief Executive Officer
801 17th Street, N.W.
Washington, D.C.
20434

38. Securities and Exchange Commission
By serving Arthur Levitt, Jr., Chairman
450 Fifth Street, N.W.
Washington, D.C.
20549

39. Selective Service System
By serving Robert W. Gambino, Director
1515 Wilson Boulevard
Arlington, VA 22209-2425

40. Small Business Administration
By serving Erskine Bawles, Administrator
409 Third Street, S.W.
Washington, D.C.
20416

FOR ARGUMENT

(16)

Supreme Court, U.S.
FILED
MAR 24 1995
OFFICE OF THE CLERK

No. 94-859

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

BRUCE BABBITT, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICI CURIAE NATIONWIDE PUBLIC PROJECTS COALITION (CO), BRAZOS RIVER AUTHORITY (TX), GRANITE CONSTRUCTION COMPANY (CA), HELIX WATER DISTRICT (CA), RANCHO CALIFORNIA WATER DISTRICT, SEMITROPIC WATER DISTRICT (CA), WEST SAN BERNARDINO COUNTY (CA) WATER DISTRICT, METROPOLITAN DENVER (CO) WATER AUTHORITY, DRAKE HOMES, INC. (CA), METROPOLITAN WATER PROVIDERS (CO), WHEELER-RIDGE MARICOPA WATER STORAGE DISTRICT (CA), THE CITY OF SAFFORD (AZ), THE VILLAGES OF OCEAN BEACH AND SALTAIRE (NY), AND THE FIRE ISLAND (NY) ASSOCIATION IN SUPPORT OF RESPONDENTS

LAWRENCE R. LIEBESMAN
(Counsel of Record)
KENNETH S. KAMLET
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March 24, 1995

Washington, D.C. • THIEL PRESS • (202) 328-3206

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United States Supreme Court Rule 37.3. 1

INTERESTS OF THE *AMICI CURIAE*

The *amici* are public sector agencies, private entities and municipalities that provide essential services to the public.[1] The *amici* include:

Nationwide Public Projects Coalition (NPPC), a not-for-profit corporation whose members include representatives of state, regional and local government agencies and associations, and private sector entities. Its members furnish the public with basic services and projects such as water supply facilities, irrigation, flood control, transportation and other infrastructure projects.

Brazos River Authority (BRA), established by the Texas legislature in 1929 to conserve, develop and put to beneficial use, the surface water resources within the Brazos River basin. BRA's jurisdiction covers 42,000 square miles, and operates a system of reservoirs with a combined water supply capacity of more than 210 billion gallons. BRA has encountered the ESA's land use prohibitions in several of its hydroelectric and pipeline projects.

Granite Construction Company, a large heavy civil contractor and construction materials producer operating nationwide, primarily in the west and southwest United States. It has provided services and materials to public and private projects that have been delayed and rendered more costly by ESA requirements.

Helix Water District, serving 50 square miles and a quarter million people in the heart of San Diego County, California. To satisfy federal drinking water requirements and meet future demands, Helix must expand the capacity of its treatment plant to 106 million gallons per day. In connection with the expansion, Helix is required

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[1] The parties have consented to the filing of this brief. The *amici* have filed letters of consent with the Clerk pursuant to this Court's Rule 37.3.

to purchase land, requiring perpetual payments for maintenance, as part of an expensive mitigation program for an endangered bird species.

Rancho California Water District (RCWD), which provides water and sewer service over a 150 square mile area in southwestern Riverside County, California. Sixty thousand residents and 18,000 businesses rely on RCWD for potable water. The ESA has delayed and driven up costs on numerous capital improvement projects undertaken by RCWD.

Semitropic Water Storage District (STWSD), located in the San Joaquin Valley, supplies water to 221,000 acres, with about 136,000 acres irrigated, in Kern County, California. The ESA has increased STWSD's operation and maintenance expenses on water projects. It is also required to set aside lands for species preservation through the Kern County Habitat Conservation Plan.

West San Bernardino County Water District (WSBCWD), a public agency organized and existing pursuant to the California Water Code, serving the County of San Bernardino. It provides domestic and fire protection water to a population of 45,000 in southern California. WSBCWD has faced the ESA's land use prohibitions arising from the listing of an endangered fly species. *See infra* at 4-6.

Metropolitan Denver Water Authority (MDWA), a political subdivision and public corporation of the State of Colorado. MDWA, made up of 20 local governments working together to develop water supplies for the Greater Metropolitan Denver, Colorado area has a total constituency of more than 300,000 persons. It repeatedly encounters ESA regulation in connection with permits it must receive to construct water facilities.

Drake Homes, Inc., a land development and single-family home construction business, serving the northern Cali-

fornia area. Drake owns several thousand acres in the Chico area that are directly impacted by the outcome of this case, because the property contains "vernal pools" that have historically been habitat for several species of an ESA-listed crustacean.

Metropolitan Water Providers (MWP), an unincorporated association of over 20 local governments and quasi-local governments whose mission is to develop water supplies for the greater metropolitan Denver, Colorado area. MWP and its individual members typically encounter costly delays from the ESA's habitat modification prohibitions, in projects such as construction of wastewater treatment facilities and water transmission pipelines.

Wheeler Ridge-Maricopa Water Storage District (WRMWSD), a water storage district and political subdivision of the State of California, encompasses 228 square miles of agricultural lands south of Bakersfield, California. WRMWSD provides water service to about 60% of these lands. Farming activities and water supply facilities within WRMWSD have been impacted by FWS's "harm" regulation.

The City of Safford, a municipal corporation located in southeast Arizona. Safford is responsible for providing water to its 18,000 residents. A flood from 1993 severely damaged their water supply facility, and, during its emergency repair, they encountered expensive delays from ESA implementation. *See infra* at 11-12.

The Incorporated Villages of Ocean Beach and Saltaire, located on Fire Island, New York, a roadless barrier island subject to overwashes and breaching from the Atlantic Ocean. ESA implementation presents great difficulties for these municipalities to implement an essential erosion prevention program. *See infra* at 8-10.

The Fire Island Association, Inc., a league of 18 property owner associations, including those from the aforementioned *amici.*

The impact of this case on the *amici,* and on the public they serve, is staggering. Enforcement by the Fish and Wildlife Service (FWS) of its "harm" regulation repeatedly delays completion deadlines for vital public works ventures, rendering them unduly expensive and depriving the public of needed services. FWS asserts that its "harm" definition is textually premised on *actual* death or injury to species. This argument bears little resemblance to the regulation's implementation in the field. On many occasions, FWS has found a prohibited "take" under Section 9 of the Endangered Species Act of 1973, with little if any supporting evidence that a species will sustain "actual" harm. It has brought numerous projects to a standstill, with a simple proffer of unsupported allegations that a certain land use may have some potential impact, at some unknowable point in time, on some unidentified member of an endangered species. The *amici* submit several illuminating examples of FWS's abuses of its authority:

1. *West San Bernardino County Water District (Water District):* In the summer of 1993, *amicus* Water District identified a need to locate a domestic water supply in light of the drought plaguing California. It drilled a well on an 80' x 120' lot (the Lot) in the City of Rialto. The following September, FWS conferred all of the Act's protections on an insect, when it listed the Delhi Sands flower-loving fly (the Fly). 58 Fed. Reg. 49,887 (Sept. 23, 1993). The well still needed to be equipped and connected to existing facilities. The Water District feared reports of criminal sentences and $50,000 fines if any of its activities modified potential Fly habitat. It contacted FWS to expediently resolve the controversy so the already-drilled well could be made operable.

The Water District faced months of unanswered phone calls and red tape. FWS finally responded in a November 4, 1994 letter, prohibiting all activities on the Lot. *Infra* App. 1a-4a. The agency stated its "current policy . . . is to consider all areas on Delhi Sands with suitable . . . habitat *as occupied*" by the Fly. Inexplicably, the Agency also admitted that its experts found no Flies on the Lot in 1994. Nonetheless, FWS warned the Water District that any disturbance of the "habitat" on the 80' by 120' Lot would "take" the Fly and violate ESA Section 9. The letter expressly cites the "harm" regulation, and its prohibition on habitat modification, as the basis for likely "take" liability. FWS would permit "takes" of the Fly incidental to the well activity, but only if the Water District submitted a Habitat Conservation Plan (HCP) pursuant to ESA §10(a)(1)(B). The HCP application required the Water District to post "adequate funding" to insure Plan implementation.

Rather than submit to FWS's ultimatum, the Water District hired an entomologist to determine the quality of Fly habitat on the Lot. He determined that no flies existed on the plot. He located the nearest Fly nest over half a mile away. Moreover, he concluded that the Lot, at best, contained degraded habitat. The Water District communicated the entomologist's findings, and is presently awaiting another response from FWS. Meanwhile, more than 18 months after FWS listed the Fly, the well remains untapped.

The Fly's listing has affected other projects in San Bernardino County. For example, FWS mandated that the San Bernardino County Medical Center (Medical Center) move and redesign an expansion to its facility to provide 1.92 acres of protected habitat for eight Flies believed to occupy the site. FWS insisted that failure to mitigate would have "harmed" the insects' habitat and exposed

the Medical Center to possible "take" liability. The Medical Center spent $3,310,199.00 to implement the required mitigation, at a cost per Fly of $413,774.25 and a one-year construction delay. This cost is the estimated equivalent to the average cost of treatment for 494 inpatients or 23,644 outpatients. App. 5a-6a.

2. *Los Angeles County Department of Public Works (LACDPW):* In June 1992, LACDPW, a member of NPPC (but not itself separately an *amicus*), developed the San Gabriel Canyon Sediment Management Plan (SMP). The SMP's goal is to remove sediment from a system of three reservoirs operated by LACDPW. These reservoirs, constructed in the 1930s, have lost approximately 25% of their original storage capacity from sediment deposition, which reduces the amount of flood protection they provide. Nonetheless, they afford significant water conservation benefits. If additional sediment enters the reservoirs and is not removed, there is danger that runoff from a major storm would exceed the downstream channel's design capacity and cause extensive flood damage.

One process LACDPW identified to clean the dams is Flow Assisted Sediment Transport (FAST). FAST involves maintaining the reservoir's water surface elevation at the lowest outlet on the dam. During storms this outlet is opened to release water at the same rate as runoff into the dam. Thus, FAST allows sediment-laden flows to pass in a manner that emulates natural conditions that would exist if the dam had never been built. LACDPW also identified a process called "sluicing," which uses equipment to agitate deposited sediment, thereby increasing the amount of sediment that can be transported by the flows.

In a February, 1993 Draft Environmental Impact Statement/Environmental Impact Report (collectively,

DEIS), LACDPW analyzed in depth several alternative courses of action, including but not limited to FAST and sluicing. LACDPW elected to pursue the FAST approach at one reservoir and sluicing at the other two. This preferred alternative will require an estimated expenditure of $16 million over a 20-year period.

FWS commented on the DEIS. It criticized LACDPW's preferred alternative, speculating impacts on the potential habitat of the Least Bell's Vireo (an ESA-listed endangered bird species; *see* 51 Fed. Reg. 16,482 (May 2, 1986)) and of the two-striped garter snake (a species proposed for listing under the ESA).[2] Literature reviews, however, indicate that none of these species have been seen in the project's vicinity for over 20 years. FWS adduced no evidence that either the bird or the snake in fact occupied the area.

LACDPW prepared a revised DEIS (at a taxpayer cost of an additional $151,000), and distributed it in August, 1994 for public comment. The revised DEIS included additional biological information showing that the project area was uninhabited by either Snake or Bird. LACDPW also reconfigured their preferred alternative to include additional mitigation measures minimizing any possible adverse impacts on those species. FWS remained inflexible. It indicated that ESA §7 consultation[3] may be required. App. 7a-18a. FWS commanded LACDPW to conduct more field surveys for other endangered, threatened and candidate species, including the Foothill yellow legged frog, the Mountain yellow legged frog,

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[2] FWS prefers the most expensive alternative, requiring LACDPW to construct a slurry pipeline at an anticipated cost of $164 million.

[3] *See infra* at 15-16. One of FWS's purposes in requiring Section 7 consultation is to insure that ESA-listed species are not "taken" by the proposed activity.

Smooth spikeweed, Braunton's milk-vetch, Gambel's watercross, the Los Angeles pocket mouse, the California leaf-nosed bat, the Wandering skipper and the Oblivious tiger beetle. In FWS's opinion, all of these and others *could* be impacted by the project and *may* be in the vicinity. *See* App. 12a.

While FWS requires LACDPW to collect more data on more species that "may occur" in the area, the public safety of the people of Los Angeles County is being compromised by the delay of this critically-needed flood control and water conservation project. Because LACDPW cannot finance the project in the manner FWS requires, it may be forced to remove one or more of the sediment-filled reservoirs from service. Even this course of action may face challenge. The dams at issue provide lush downstream habitat for other wildlife. If LACDPW renders them inoperable, it could face "take" liability for "harming" species downstream. LACDPW is, quite literally, damned if it does and damned if it doesn't.

3. *Fire Island, New York:* The south shore communities of Long Island, New York, including the *amici* incorporated Villages of Ocean Beach and Saltaire, are less than a two-hour drive from midtown Manhattan. Harsh storms in recent years have ravaged these coastal areas. The winter nor'easters from 1992-93 caused over $230 million in damage to homes, businesses and infrastructure. Fire Island, one of the barrier islands protecting the Long Island mainland and the Great South Bay (a major shellfishery and recreational resource) from the Atlantic Ocean, has endured significant erosion damage. Currently, serious "breaches"[4] of Fire Island from Atlantic

[4] Barrier islands like Fire Island are narrow and can be overwashed by ocean waves in severe coastal storms. Unattended overwashes become "breaches," wherein water flows at shallow depths

[footnote continued]

inundation receive no coordinated, prompt attention. Larger breaches will be exorbitantly expensive if not impossible to close. For example, one overwash from the December, 1992 nor'easter could have been closed quickly. However, without a response program in place, it enlarged to a breach half a mile wide and 20 feet deep. All of the structures displaced by the breach were lost. It cost almost $8 million to close.

In 1993, then-Governor Cuomo appointed a multi-agency Coastal Erosion Task Force to address the chronic flooding and erosion. It developed a plan to provide emergency beach nourishment (Emergency Plan),[5] to fill in those areas of Fire Island overwashed by Atlantic tempests. The Emergency Plan is a stop-gap, post-storm measure, pending development of a more long-term program, to deter expansion of breaches on the barrier island. No federal funding is allocated to assist financing this critical erosion response program.

Myriad federal, state and municipal agencies worked cooperatively to forge the Emergency Plan.[6] The Emergency Plan provides special protection for environmentally sensitive areas. For example, unique considerations are afforded to habitat of the Piping plover, an ESA-listed endangered bird (*see* 50 Fed. Reg. 50,733 (Dec. 11, 1985)). Plovers are adapted to storm-maintained areas

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from ocean to bay continuously at low tide. Breaches, in turn, are widened and deepened by natural hydraulic forces and can quickly become new "inlets," or passageways between two islands connecting ocean to bay.

[5] A list of documents pertaining to the development of the Emergency Plan is contained in the Appendix. *See* App. 32a.

[6] The National Park Service Proposed the Interim Plan. It was developed with input from the U.S. Army Corps of Engineers, the New York State Department of Environmental Conservation, the New York State Department of State, the New York Sea Grant Program, the Suffolk County Planning Department, and the Towns of Islip and Brookhaven, in consultation with FWS.

like ephemeral pools and overwash fans. The Emergency Plan requires that, if a proposed breach fill occurs during the Plover's nesting season, a qualified plover monitor be retained prior to fill activity; the monitor is to conduct at least three days of surveying in the vicinity of the precise site where fill activity will occur; the monitor will oversee the fill activity while it is carried out; and nesting sites, with buffer zones, must be cordoned off with fencing to reduce pedestrian and vehicle traffic.

Despite these requirements designed specifically to protect the plover, the sole opponent to the Emergency Plan is FWS. It has wielded its authority to require lengthy consultation under ESA §7, regarding habitat (a new overwash or breach), that may not contain plovers, that may not even be created by some future event (a coastal storm). FWS would require consultation after *each and every* storm, no matter how devastating, entirely defeating the Emergency Plan's prompt response objective. It is unclear how measures proposed in a lengthy Section 7 consultation would differ from those already included in the Emergency Plan.

4. *Abuses Related to the Fairy Shrimp:* The listing of several species of fly-sized crustaceans known as fairy shrimp (*see* 59 Fed. Reg. 48,136 (Sept. 19, 1994)), have wreaked havoc for property owners in California's Central Valley. Even prior to their final listing, essential utility projects proved no match for the formidable shrimp. For example, the Pacific Gas Transmission Company/ Pacific Gas & Electric (PGT/PG&E) proposed to expand and upgrade an already existing pipeline to satisfy an ever-burgeoning consumer demand for natural gas. The new construction would take place in the right-of-way adjacent to PGT/PG&E's existing pipeline. FWS determined that the pipeline, stretching 845 miles from the Canadian border into California, would impact only 2.34

acres of vernal pools[7] in the Sacramento area. App. 19a-21a. Moreover, FWS admitted it did not know which of the impacted vernal pools actually possessed crustacean populations. It therefore assumed that the shrimp occupied all of the impacted vernal pools. App. 24a. On this simple presumption, FWS held the pipeline construction hostage. To offset any "takes" of the fairy shrimp or its 2.34 acres of habitat, it extorted from PGT/PG&E a 117-acre set aside of ratepayer land. App. 24a-25a.[8]

5. *City of Safford, Arizona: Amicus* City of Safford is a community of 18,000 people located in southeast Arizona. Its primary source of water is Bonita Creek. In January 1993, a major flood struck Safford, severely damaging the Bonita Water System. App. 28a. As soon as flood waters receded, the City secured an engineer to institute emergency repairs to the System. The Federal Emergency Management Agency (FEMA) was on hand to assist with funding.

FWS brought the project to a halt, because Bonita Creek was designated part of the "critical" habitat for the razorback sucker, an endangered fish. *See* 56 Fed. Reg. 54,967 (Oct. 23, 1991). Other federal wildlife officials, however, found that no suckers in fact occupied or could have survived the Creek after the flood. App. 30a. These officials also concluded that the suckers had not adapted to the Bonita Creek environment even under normal con-

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[7] Vernal pools are ephemeral and isolated "bodies" of water that form in shallow land depressions, underlain by a hardpan layer that prevents the downward percolation of water. They fill with rain water in the fall and winter, and either shrink or evaporate in the summer.

[8] At an 11:1 mitigation ration, the required 117 acre set-aside bears no "rough proportionality" to potential impacts that the pipeline's construction would have on 2.34 vernal pool acres. Onerous requirements such as these, made by FWS to prevent hypothetical "takes" of species and habitat, are constitutionally suspect after *Dolan v. City of Tigard*, ___ U.S. ___, 114 S.Ct. 2309 (1994).

ditions. Yet, FWS insisted that, to prevent "takes"of the fish and their unoccupied habitat, no repair equipment could enter the stream (for fear of crushing nonexistent suckers); rock filter beds needed to be installed downstream from the construction site (to prevent silt from irritating fish gills); and equipment had to be "diapered" to prevent fluid leaks (even though the equipment itself was not allowed to enter the Creek). FWS's edict to protect absent fish delayed construction repair to the Bonita Water System for six months. During this time all emergency wells were in operation, at a great cost to the City of Safford. The estimated costs of the delays, generated by FWS's implementation of the ESA, is $1,090,620.00.

These scenarios confirm the *amici*'s belief that, as FWS construes its "harm" regulation, it has not cooperatively resolved issues concerning water resources and other public works projects "in concert" with wildlife preservation as mandated under Section 2(c)(2), 16 U.S.C. §1531(c)-(2). There is a dire need to circumscribe the scope of FWS's "harm" regulation. Projects designed to confer far-reaching benefits have been halted because an insect or animal may have inhabited, at some point in the past, a certain parcel of land. Rationality must be interjected into FWS's "harm" regulation. This Court now has that opportunity.

SUMMARY OF ARGUMENT

1. FWS's "harm" regulation is *ultra vires* of the ESA, because it prohibits ordinary land uses and does not restrict the "take" concept, as traditionally defined by common and statutory law, to forceful conduct directed towards individual and identifiable members of listed species.

2. FWS insists its "harm" regulation is precisely phrased to require "actual" death or injury to species. However,

as the regulation is implemented, the agency prohibits ordinary land uses as Section 9 "takes" without any showing of death or injury to species members. Additionally, the textual similarity between the "harm" regulation and the definition of "critical" habitat indicates that FWS considers ordinary land uses as "takes."

3. FWS's "harm" regulation does fundamental injustice to the Act's overall design. It expands Section 9's reach to make Section 7(a)(2)'s proscriptions irrelevant; ignores the difference between "geographical" and "critical" habitat; and deprives nonfederal parties of the procedural protections associated with formal "critical" habitat designations.

ARGUMENT

I.

APART FROM THE PROHIBITION IN §9(a)(1)(B), THE ESA IS REPLETE WITH PROVISIONS SHOWING THAT CONGRESS DID NOT INTEND TO EXPAND "TAKE" BEYOND ITS TRADITIONAL MEANING OF ACTUAL FORCE DIRECTED TO INDIVIDUAL MEMBERS OF WILDLIFE SPECIES.

There is compelling intrinsic evidence in the ESA that Congress intended to restrict the "take" concept to activities that apply force to, and wield control over, specific species members. While the court's opinion below reaches this result emphasizing the text in Section 9(a)(1)(B), other ESA provisions mandate this interpretation as well.

Judge Williams observed that the words accompanying "harm" in Section 3(19) "involve a substantially direct application of force, which the Service's concept of forbidden habitat modification altogether lacks." Pet. App. 5a-6a. Similarly, Judge Sentelle wrote that all of the verbs associated with "take" in Section 3(19) contemplate behavior that "a specifically acting human does to a spe-

cific individual representative of a wildlife species." Pet. App. 70a.[10] Common law has traditionally prohibited as wildlife "takes" forceful conduct directed towards individual organisms, that has killed, bodily injured or reduced to human possession specific members of species. *See Hughes v. Oklahoma*, 441 U.S. 322, 341-42 (1979) (Rehnquist, J., dissenting); *Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976). The Section 9 "take" prohibition thus rests on firmament dating to Roman and feudal times, where it was illegal to "take" the King's wildlife and hunting was banned wholesale. *See* MICHAEL J. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW (revised and expanded ed.) Praeger 10-11 (1983). As the court below found (Pet. App. 5a-7a), the Section 9(a)(1)(B) prohibition does not stretch "take" beyond its common law meaning.[11] That "take" only encompasses forceful conduct directed towards identifiable organisms is buttressed by these other ESA provisions:

1. ***Section 9(a)(1) Generally***. In ascertaining the scope of "take," Section 9(a)(1) provides the appropriate frame

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[10]This is consistent with the Court's ruling on ESA standing, *Lujan v. Defenders of Wildlife*, ___ U.S. ___, 112 S.Ct. 2130 (1992). In *Lujan*, the Court denied ESA standing to an environmental organization because its injuries were, *inter alia*, "conjectural [and] hypothetical." *Id.* at 2136 (citations omitted). Judge Williams' reading that "take" requires force directed towards specific and identified species members is similarly designed to insure that FWS does not enforce the "harm" regulation in a manner where an actual kill or injury can only be supposed or conjectured. *See* Pet. App. 6a.

[11]This Court hesitates to rely upon speculative allegations of environmental degradation as a basis to expand well-established principles beyond common law parameters. *E.g., Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886, 2897-2902 (1992) ("nuisance" restricted to traditional meaning at common law; the concept cannot be interpreted expansively to deprive property owners of just compensation for a Fifth Amendment "taking"). The court below cited *Lucas* persuasively. Pet. App. 3a-4a.

of reference. "Takes," outlawed under subsection (B), are not the only activities prohibited by Section 9(a)(1). Congress also made it unlawful for any person to: import and export listed species (16 U.S.C. §1538(a)(1)(A)); possess, sell, deliver, carry, transport or ship any "taken" species (*id.* §1538(a)(1)(D)); deliver, receive, carry, transport or ship any listed species in interstate or foreign commerce (*id.* §1538(a)(1)(E)); and sell or offer for sale in interstate or foreign commerce any listed species (*id.* §1538(a)(1)(F)). All of these commercial activities require the exercise of dominion over individual species members. Section 9(a)(1)(B) "takes" must not be wrenched from this context. Because FWS's "harm" regulation renders unlawful ordinary land uses that are neither forcefully directed toward, nor reflect the core concept of possession over, specific and identified organisms, it is *ultra vires.*

2. ***Section 7(b)(4)(A)-(B).*** Whenever a federal agency seeks to "carry out" an action, Section 7(a)(2) requires it to "consult" with FWS to insure that such action "is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of [critical] habitat of such species. . . ." 16 U.S.C. §1536(a)(2). After consultation is completed, Section 7(b)(4) requires the Secretary to provide a "written statement" to the agency, and to any applicant who requires a federal permit from the agency, before the action can be carried out. *Id.* §1536(b)(4). The Secretary can make several conclusions in his written statement: (I) that the "agency action will not violate [Section 7(a)(2)]," whereupon he can propose "reasonable and prudent alternatives" to the proposed federal action so that it will not violate Section 7(a)(2) (*see* 16 U.S.C. §1536(b)(4)(A)); or (II) that the "taking" of an ESA-listed species "incidental to the agency action" will

not violate Section 7(a)(2) (*see* 16 U.S.C. §1536(b)-(4)(B)). Thus, Section 7(b)(4) makes clear that a federal agency can violate Section 7(a)(2) in three distinct ways: by jeopardizing listed species; by destroying or adversely modifying their critical habitat; or by "taking" them in violation of Section 9. Any federal "taking" that complies with the terms and conditions of the Secretary's written statement is not considered a Section 9 violation. 16 U.S.C. §1536(o)(2).

Congress distinguished federal conduct that "takes" species, prohibited by Section 9,[11] with the jeopardy and habitat modification prohibitions contained in Section 7(a)(2). "Take" activity must mean something different from "jeopardy" activity or "adverse[ ] modification of habitat" activity. "Take" cannot mean activity that reduces the likelihood of the species as a whole to survive and recover; these activites are encompassed within "jeopardy."[12] The *only* remaining definition that gives the term "take" individual meaning is activity that exerts intentional, direct and concrete force over discrete members of a larger species class.

Petitioners distinguish the prohibitions in Section 7 from those in Section 9 by acknowledging that "[a] particular action may cause a taking of individual members

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[11] Section 9's prohibitions, including "takes," apply to "any person." 16 U.S.C. §1538(a)(1). This includes federal agencies as well as nonfederal parties. *Id.* §1532(13). Accordingly, the regulation defining the scope of "harm" applies to federal and nonfederal parties alike. Section 7(a)(2)'s prohibitions, however, only address federal conduct.

[12] The ESA does not define "jeopardy." An FWS regulation provides that "jeopardy" activities "reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild . . . ." 50 C.F.R. §402.02. The regulation makes clear that "jeopardy" is not aimed at individual members of ESA-listed species, but rather proscribes conduct that affects the species as a whole.

of a listed species, but not adversely affect the species as a whole to such an extent that it violates the 'jeopardy' prohibition or critical habitat restrictions in Section 7(a)-(2)." Pet. Br. 42. This is precisely the point. Section 9 and Section 7(a)(2) encompass different genres of prohibited activity. Section 9's independent purpose is to regulate conduct of nonfederal parties (which is unaffected by Section 7(a)(2)), and to prohibit all parties from "taking" individual, identifiable members of wildlife (which is regulated by neither Section 7(a)(2)'s "jeopardy" nor modification of "critical" habitat restrictions). The challenged regulation, in defining prohibited Section 9 conduct, eradicates this structural difference. *See infra* at 23.

3. ***Section 7(b)(4)(C).*** Another finding the Secretary can make in his post-consultation written statement is that, if a federal action impacts a marine mammal, "the taking is authorized pursuant to" the Marine Mammal Protection Act (MMPA). *See* ESA §7(b)(4)(C), 16 U.S.C. §1536(b)(4)(C). When subsections 7(b)(4)(A) and (C) are read conjunctively, it is again clear that prohibited MMPA "take" activity differs from other prohibited ESA activities that jeopardize species or adversely modify critical habitat. In fact, MMPA "take" *has* been interpreted as limited to "direct" intrusions against specific members of species listed under that act. *See United States v. Hayashi,* 22 F.3d 859, 865 (9th Cir. 1993) (no MMPA "take" where bullets, fired at four porpoises, failed to make bodily contact). Accordingly, the structure of ESA §7(b)-(4) requires that ESA "takes" and MMPA "takes" be construed differently from activities prohibited under Section 7(a)(2). Congress must have intended for "takes" under both Acts to encompass the same conduct, namely, direct action against particular wildlife members.

4. ***Section 10(e).*** The exception for Native Alaskans is another provision in the Act favoring a definition of

"take" as the exercise of force. Section 10(e) exempts Alaskan natives from Section 9's prohibitions where the "taking" is for "subsistence purposes" like food consumption. 16 U.S.C. §1539(e). Native Alaskans can also make "authentic handicrafts and clothing" from the "non-edible by-products of species taken" and sell them in interstate commerce without running afoul of the ESA. *Id.* All of the activities tantamount to an ESA "take" contemplated by Section 10(e) relate to consumptive or commercial uses of individual components of species.

5. ***Section 11(e)(4).*** This section falls within the ESA's enforcement provisions. Subsection (A) provides that all species members "*taken,* possessed, sold, purchased, offered for sale or purchase, transported, delivered, received, carried, shipped or imported . . . shall be subject to forfeiture to the United States." 16 U.S.C. §1540-(e)(4)(A) (emphasis added). This range of conduct, including "take," reflects the common law proscription of control over specific and identifiable wildlife organisms. Likewise, subsection (b) states that "all guns, traps, nets and other equipment . . . used to aid in the *taking,* possessing, selling, [etc.] . . ." of ESA-listed species "shall be subject to forfeiture to the United States." *Id.* §1540(e)(4)(B). The sole purpose of the devices that Congress specified (guns, traps and nets) is to inflict bodily harm on individual members of species or reduce them to human possession. Under FWS's "harm" regulation, however, the plow of the farmer, the hammer of the builder, and the saw of the logger can all be seized by the United States government. Certainly, Congress did not intend for the ESA's provisions to generate such Orwellian results.

To conclude, the ESA's plain language demonstrates Congress' intent regarding the scope of the term "take." Under the *Chevron* "Step One" analysis, if congressional intent can be divined by analyzing the statutory text and

employing "traditional tools" of construction, then that "interpretation must be given effect, and the regulations at issue must be fully consistent with it." *NLRB v. Food & Commercial Workers*, 484 U.S. 112, 123 (1987); *see Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843-45 (1984). Apart from the prohibition in Section 9(a)(1)(B) and the definition in Section 3(19), the ESA contains repeated textual evidence that the embrace of "take" *is restricted to applications of force, and efforts to dominate, specific organisms that comprise a wildlife species.* FWS's "harm" regulation, however, rejects this evidence. Although the interpretation may be longstanding, it is not entitled to deference. *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991). As Judge Williams ruled when he denied panel rehearing, the ESA "manifests a clear determination by Congress that the prohibitions in §9 should not reach habitat modifications as defined by [FWS], where there is no direct action by the defendant against any member of the species." Pet. App. 95(a). His analysis is compelling.

II.

FOR ALL PRACTICAL PURPOSES, THE "HARM" REGULATION PROHIBITS HABITAT MODIFICATIONS *PER SE* AS SECTION 9 "TAKES," WITHOUT ANY CONCOMITANT SHOWING OF "ACTUAL" INJURY TO SPECIES.

FWS insists that its "harm" regulation is an exacting work of regulatory craftsmanship, "carefully tailored" to prohibit only "actual" kills and injuries and not bare habitat modifications. Pet. Br. 20. As highlighted earlier (*supra* at 4-12), the implementation of the challenged regulation belies their point. FWS has threatened "take" liability on several of the *amici* merely because a land use modified *potential* habitat. The agency has not required "actual" bodily injuries to a single Delhi Sands flower-

loving fly, a lone striped-garter snake, an identified Piping plover, or an individual razorback sucker. Upon the simple showing of an alteration to these species' potential habitats, the agency finds the recipe for a "take."

Moreover, when Judge Williams denied panel rehearing (Pet. App. 93a), he compared the language of the "harm" regulation to the statutory and regulatory text defining "critical" habitat. Based upon this comparison, he too concluded that, from the practical standpoint of nonfederal property owners, the agency regulates bare land uses as "takes." The challenged regulation states "harm" is "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing *essential behavioral patterns, including breeding, feeding or sheltering.*" 50 C.F.R. §17.3 (emphasis added). ESA §3(5)(A)(i) defines "critical" habitat, *inter alia,* as those land areas "containing physical and *biological features* (I) *essential* to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. §1532(5)(A)(i).[13] FWS lists physical and biological "features" that identify "critical" habitat areas as including: "population growth, food and water resources, shelter, breeding and rearing sites, and habi-

[13] At the point when a species is listed, the Secretary must "concurrently" designate "critical" habitat. ESA §4(a)(3)(A), 16 U.S.C. §1533(a)(3)(A). He can deviate from this rule in only two narrow instances: (1) when he determines it is "essential to the conservation of such species" to implement a final listing rule prior to the time that he has completed work on a critical habitat designation; and (2) where critical habitat for the listed species "is not presently determinable," he may defer critical habitat designation up to a year from the date of listing. ESA §4(b)(6)(C)(i)-(ii), *id.* §1533(b)(6)(C)(i)-(ii). Despite these two limited exception, Congress intended that "[t]he designation of critical habitat is to coincide with the final listing decision absent extraordinary circumstances." *Northern Spotted Owl v. Lujan,* 758 F.Supp. 621, 626 W.D. Wash. 1991).

tats that are representative of the historic distribution of the species," 50 C.F.R. §424.12(b).

The definitions of both "harm" and "critical" habitat emphasize "essential" biological "patterns" or "features" that are necessary for any species to survive. Under FWS's regulatory construct, one "harms" species and causes "actual injury" merely by modifying their "critical" habitat, without any showing of death or injury. Judge Williams found as much. *See* Pet. App. 92a. In light of FWS's regulations regarding modifications to "critical" habitat under Section 7, and those habitat modifications referenced in the "harm" regulation and prohibited under Section 9, there is no "substantive, operational difference" between land uses and unlawful "takes." *Id.* The regulation is *ultra vires* for this reason. Congress did not intend Section 9 to encompass ordinary land uses by nonfederal parties.

III.
THE HARM REGULATION IS *ULTRA VIRES* BECAUSE IT UPSETS THE OVERALL STATUTORY DESIGN CONGRESS ENVISIONED WHEN IT STRUCTURED THE ESA.

Apart from the specific textual evidence cited above, the ESA's overall structure makes clear that "take" does not contemplate mere habitat modifications. By defining a single word – "harm" – FWS distorts the entire species preservation regime Congress established.

A. FWS's "harm" regulation impermissibly engrafts onto nonfederal parties the strictly federal responsibility to avoid habitat modifications.

As the D.C. Circuit recognized, "on a specific segment of society, the federal government, the Act imposes very broad burdens, including the avoidance of adverse habitat modifications; on a broad segment, every person, it

imposes relatively narrow ones." Pet. App. 7a-8a. The "harm" regulation turns this structure on its head. It expands the federal government's Section 7(a)(2) habitat modification restrictions, through the Section 9 "take" prohibition, to bind the activities of nonfederal parties as well.

While conduct of both federal and nonfederal parties is regulated by Section 9 (*see supra* n.11), federal agencies also have the higher and affirmative duty under Section 7 to "conserve" species. 16 U.S.C. §1531(c)(1); *id.* §1536-(a)(1). "Conservation" is an ESA term of art that means "the use of all methods and procedures to bring any endangered species . . . to the point" where it no longer needs the Act's protections. *Id.* §1532(3). The term requires federal agencies to "do far more than merely avoid the elimination of protected species"; rather, they are given an "affirmative duty to increase the population of protected species." *Defenders of Wildlife v. Andrus,* 428 F.Supp. 167, 169 (D.D.C. 1977). *See also Pyramid Lake Paiute Tribe of Indians v. United States Dep't of Navy,* 898 F.2d 1410, 1416-17 (9th Cir. 1990).

One of the ways in which a federal agency "conserves" species is to insure its actions do not violate Section 7(a)-(2)'s prohibitions, including the direction to avoid destroying or adversely modifying "critical" habitat – that habitat considered essential to the "conservation" of species. 16 U.S.C. §1532(5)(A)(i)). Congress' use of the word "conservation" in defining "critical" habitat was not coincidental. As only federal agencies shoulder the responsibility to "conserve" species, they are also the only entities that must avoid modifying "critical" habitat. Petitioners agree that designated "critical" habitat only impacts federal agencies and does not generally restrict nonfederal actors. *See* Pet. Br. 44. *See also* James Salzman, *Evolution and Application of Critical Habitat Under*

the Endangered Species Act, 14 HARV. ENVT'L L.J. 311, 315 (1990) (hereafter *Evolution of Critical Habitat)* ("critical habitat has legal significance only within the scope of Section 7. It controls only federal action; solely private and state actions are immune from section 7's prohibitions").

Under FWS's "harm" regulation, however, solely nonfederal activity modifying any and all habitat, including "critical," is a prohibited "take." The panel majority found as much. *See* Pet. App. 91a-94a ("harm" regulation imposes on private parties responsibilities that are identical to those imposed on federal agencies under Section 7). Congress did not intend this result. Private parties are not required to "conserve" species, nor are they required to avoid modifying habitat essential to "conservation." FWS unlawfully augments the habitat restrictions that expressly apply only to the federal government in Section 7(a)(2), by prohibiting both federal *and* nonfederal habitat modifications under Section 9. Section 7(a)(2) is thus rendered superfluous. *See* MICHAEL J. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW 397 (1977) ("if 'taking' comprehends habitat destruction, then it is at least doubtful whether Section 7 of the Act is even necessary") (cited below at Pet. App. 93a).

B. FWS's "harm" regulation places on nonfederal actors species preservation duties that are greater than those imposed on federal agencies, and deprives landowners the procedural protections to which they are entitled under the "critical" habitat provisions.

As shown above, the federal government's duties to avoid adverse habitat modifications expressly extend only so far as "critical" habitat. FWS's "harm" regulation,

however, proscribes nonfederal conduct on *any* and *all* habitat. It places the highest level of species preservation responsibilities on private, state and municipal actors. They are prevented from modifying habitats *wherever* a species *may* be located.

To this end, the agency reads out of the Act the distinctions between mere "geographical" and "critical" habitat. ESA §3(5)(C) succinctly pronounces: "critical habitat shall not include the entire geographical area which can be occupied by the endangered or threatened species." *Id.* §1532(5)(C). *See also* 16 U.S.C. §1532(5)-(A)(i) ("critical" habitat is those "specified areas *within* the geographical area occupied by the species. . . .") (emphasis added).

"Geographical" habitat therefore does not exhibit the same characteristics as "critical" habitat. It is not essential to species conservation; it does not play a decisive role to insure that breeding, feeding, and sheltering patterns are met; and it does not warrant "special management considerations or protection." *See supra* at 20. While individual members of species that live on "geographical" habitat must be protected, the land itself, unlike "critical" habitat, is not the subject of any heightened protections under Section 7(a)(2). Likewise, there is no indication that Congress afforded exalted status to "geographical" habitat in the Section 9 "take" prohibition.

The subject regulation entirely ignores the ESA's habitat hierarchy. In fact, under FWS's regulation, merely "geographical" habitat is the illogical recipient of greater protections than "critical" habitat. While "critical" habitat designations proscribe only federal conduct, the "harm" regulation prohibits activities of federal, state, municipal *and* private actors on "geographical" habitat.

FWS may find the difference between "critical" and "geographical" habitat inconsequential. The practical difference to nonfederal landowners, however, cannot be overstated. In the "critical" habitat context, the ESA contains an elaborate mechanism to alert landowners as to what activities, on what land, may be restricted. To wit: when the Secretary designates or revises "critical" habitat,[14] Section 4(b)(4) mandates him to first conduct public notice and comment rulemaking proceedings pursuant to the Administrative Procedure Act (APA). 16 U.S.C. §1533(b)(4). General notice of any *proposed* regulation designating or revising critical habitat must be published in the Federal Register, and a public hearing must be held upon the request of any person made within 45 days after proposed rule publication. *Id.* §1533(b)(5)(A)(i), (E). At this point, public participation is crucial from the perspective of property owners; they have the opportunity to present salient cost-benefit information, and the Secretary must consider the economic impacts of his "critical" habitat designations. *Id.* §1533(b)(2).[14] *See Evolution of Critical Habitat,* 14 HARV. ENVT'L L.J. at 320 (addition by the ESA's 1978 Amendments of the "cost benefit analysis" in critical habitat designations "changed the process from a purely biological assessment to a social policy decision").

The ESA's public notice mechanism does not end here. Within one year after publication of the proposed rule, the Secretary must then publish in the Federal Register a *final* rule regarding critical habitat designations or revisions. 16 U.S.C. §1533(b)(6)(A)(i)(I). In the final rule, the Secretary must describe and evaluate "those activities (whether public or private) which . . . if undertaken may adversely modify [critical] habitat, or may be affected by [its] designation." ESA §4(b)(8), 16 U.S.C. §1533(b)(8).

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[14] *See supra* note 13.

FWS's "harm" regulation under Section 9 does an end-run around the formal public participation scheme constructed by Congress. Landowners are left entirely to the whims of FWS regarding whether their parcels are even considered mere "geographical" habitat. They do not know up-front, at the time a species is listed, what land uses on the "geographical" habitat they own will constitute a "take." Unlike "critical" habitat areas, owners of "geographical" habitat are not given the benefits of a statement from the Secretary of the Interior, explaining and describing what land uses will not be actionable under the ESA.

A recent report from the General Accounting Office states that 781 plant and animal species are listed in the United States, and only 105, or less than 24%, have designated "critical" habitat. *See* General Accounting Office, *Endangered Species Act: Information on Species Protection on Nonfederal Lands* 4, 6 (December 1994). Therefore, in the vast majority of situations, nonfederal landowners who own "geographical" habitat receive none of the notice associated with "critical" habitat designations. The rule of "concurrent" critical habitat designations has become a meaningless mandate. *See supra* note 13.

The examples we cite (*supra* at 4-12) demonstrate the practical impact of FWS's failure to meet its duty here. Significant public resource projects have been delayed because FWS insists on regulating any "geographical" area that may possibly contain the Delhi Sands flower-loving fly, the Foothill yellow legged frog or the Oblivious tiger beetle. Every storm that strikes the unnourished beaches of Fire Island and erodes its dunes leaves homes vulnerable to destruction, because beach replenishment can potentially have unspecified impact on the piping plover. In none of these cases has FWS indicated when it will designate the critical habitats for these spe-

cies and afford landowners with the process and notice Congress intended.

To conclude, FWS misuses its "harm" regulation as a "back-door" substitute for designating "critical" habitat. It construes as "harm" land uses on *all* habitat, rendering them *all* illegal "takes." For these reasons, the "harm" regulation is *ultra vires* of the ESA.

C. A determination by this Court that the "take" prohibition does not include habitat modifications is necessary to place realistic parameters around the Section 5 land acquisition mechanism.

Another mechanism for the federal goverment to satisfy its "conservation" obligations is contained in Section 5(a)(2). It provides that the Secretary "shall establish and implement a program to *conserve* wildlife," and, to this end, he "is authorized to acquire by purchase . . . lands, waters or interest therein . . . ." 16 U.S.C. §1534-(a)(2). *See* Pet. App. 7a-8a.

Petitioners' *amici* Scientists make the point that the land acquisition mechanism is an infrequently used device. *See* Sci.Am. Br. 18-19. Just because the Secretary rarely employs his authority here does not warrant relegating Section 5 to minor status. In this age of budgetary austerity, the *amici* Scientists cannot expect the Secretary to purchase occupied and unoccupied, "geographical" and "critical," habitat of all endangered and threatened species. Rather, the Secretary should devote his limited financial resources to purchase only habitat that is "essential" to species conservation – namely, "critical" habitat. The focus of the Secretary's efforts can be narrowed even further. Federal agencies are already restricted by the habitat modification prohibition in Section 7(a)(2). The Secretary can concentrate on purchasing "critical" habitat, occupied by species, which has no federal nexus

and is strictly privately or state-owned. A sensible triage approach can be applied to the Section 5 land acquisition mechanism, upon this Court's confirmation that habitat modifications are not encompassed within Section 9.

IV.

THIS COURT'S RULING IN *TVA v. HILL* IS FULLY CONSISTENT WITH THE CONCLUSION THAT "TAKE" DOES NOT SUBSUME MERE HABITAT MODIFICATIONS THAT UNINTENTIONALLY KILL OR INJURE SPECIES.

The Court's seminal ruling on the ESA to date, *TVA v. Hill,* 437 U.S. 153 (1978), fully comports with the conclusion that "take" does not encompass habitat modifications. While Petitioner highlights that the Court "cited the 'harm' regulation approvingly" (Pet. Br. 16), it is also abundantly clear that the situation confronting this Court fell within the narrow confines of Section 7(a)(2)'s "critical" habitat prohibition. The major premise coloring the entire opinion was that, if the Tellico Dam's gates were opened, a *federal agency would have destroyed the entire "critical" habitat of the endangered snail darter:*

> We began with the premise that operation of the Tellico Dam will either eradicate the known population of snail darters *or destroy their critical habitat.*

437 U.S. at 171 (emphasis added).

The Court appreciated the significance of "critical" habitat. It found that, if TVA's planned operation of the Dam were permitted, the agency would have violated its obligations under Section 7. 437 U.S. at 173-74. It also expressed in *dicta* that TVA's same activities would have "harmed" the snail darter and resulted in a Section 9 "take." *Id.* at 184-85 n.30. Thus, the result in *TVA v. Hill* confirms the now well-established precept that federal agencies have a strict responsibility to avoid destroying or adversely modifying "critical" habitat under Sec-

tion 7(a)(2). Petitioner and its *amici* gloss over the significant fact that *TVA v. Hill* addressed a species even rarer than an endangered one – namely, an endangered species with a critical habitat designation. *See supra* at 26. From this unique scenario, they misinterpret and expand the decision's reach to prohibit *nonfederal* land use modifying *any* habitat as a "take" under Section 9.[15]

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[15] Significantly, the other case that Petitioner emphasizes, and that troubled former Chief Judge Mikva (Pet. App. 27a), also arose in the rare context of a "critical" habitat designation. In *Palila v. Hawaii Dep't of Land and Natural Resources (Palila I)*, 639 F.2d 495 (9th Cir. 1981) and *Palila II*, 852 F.2d 1106 (9th Cir. 1988), the Ninth Circuit found that the state's game management program resulted in "takes" of the Palila bird, which could be "found only on the slopes of Mauna Kea on the Island of Hawaii." 852 F.2d at 1107. The court found a violation of the FWS's "harm" regulation because the habitat modification there adversely affected "critical" habitat, which would have been designated with attendant procedural protections. *See* 852 F.2d at 1107; 639 F.2d at 495. However, we question the *Palila* rulings to the extent they apply the ESA's "critical" habitat prohibitions to nonfederal parties, in these cases a state agency. *See* J.B. Ruhl, *Regional Habitat Conservation Planning Under the Endangered Species Act: Pushing the Legal and Practical Limits of Species Protection*, 44 SW. L.J. 1393, 1410 n.94 (1991) (criticizing *Palila* decisions as "unusual in that the courts found a prohibited take had occurred even though no federal action was involved to invoke the section 7 prohibition on adverse modification of critical habitat").

CONCLUSION

For the foregoing reasons, the Court should find FWS's "harm" regulation *ultra vires* of the Endangered Species Act because (1) the term "take" as it is used throughout the Act strictly contemplates activities that are forcefully directed to individual species members; and (2) prohibiting habitat modifications carried out by non-federal parties will upset the careful species preservation regime designed by Congress, and read key distinctions out of the Act.

Respectfully submitted,

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March 24, 1995

APPENDIX A

[SEAL]

UNITED STATES DEPARTMENT OF THE INTERIOR

FISH AND WILDLIFE SERVICE

Ecological Services
Carlsbad Field Office
2730 Loker Avenue West
Carlsbad, California 92008

November 4, 1994

Mr. Leon Long
West San Bernardino County Water District
855 West Base Line, P.O. Box 920
Rialto, CA 92377-0920

Re: Construction of proposed Well #41 and #42 sites

Dear Mr. Long:

The Fish and Wildlife Service (Service) is in receipt of your letter dated September 29, 1994, and is responding to your request for approval and/or comments regarding the construction of the above referenced sites.

The project as proposed for Well #41, located adjacent to the east side of the Agua Manza Cemetery in the City of Colton, includes construction of the well site and associated facilities. The project as proposed for Well #42, located south of San Bernardino Avenue near the intersection of Riverside and San Bernardino Avenues in the City of Rialto, includes the construction of the electrical service and waterline to the existing 80' x 120' well site area. The well site will require some grading so the district can construct a security fence for the protection of their equipment.

At issue is the potential effect of the proposed projects on the federally listed Delhi Sands flower-loving fly (*Rhaphiomidas terminatus abdominalis*; DSF). Several factors relating to habitat loss and destruction, including urbanization, agricultural activities, sand mining activities, illegal dumping, off-road vehicles, and invasion of non-native plants, have been identified as threats to the continued survival of the DSF. Due to the imminent danger of extinction, the Service listed the DSF as endangered on September 18, 1993. As a federally listed species, the DSF is afforded all the protections of the Endangered Species Act of 1973, as amended (Act).

The current policy of the Service is to consider all areas on Delhi Sands with suitable DSF habitat as occupied, and disturbance of this habitat to be a potential violation pursuant to Section 9 unless authorized pursuant to Section 7, or Section 10 of the Act. Section 9 of the Act specifically prohibits 'take' of listed species. The Act defines 'take' as follows: "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to engage in any such conduct." Take is further defined in 50 C.F.R. chapter 1, part 17.3 through the definition of harass and harm as follows: "Harass in the definition of 'take' means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering. Harm in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential

behavioral patterns, including breeding, feeding or sheltering."

As you are aware, the Service has been discussing the proposed well sites with West San Bernardino County Water District since February 1994. At that time we informed you that more information was necessary to determine the potential project-related impacts to the DSF. Surveys conducted by the Service this past summer and further consultation with local entomologists have resulted in additional information regarding the distribution and habitat suitability of the DSF in the vicinity of the proposed project areas. No DSF were observed at either site during 1994. The habitat on well site #41 was determined to be of low suitability for the DSF due to the high level of disturbance on the property. The habitat on the well #42 site, however, was evaluated as medium to high quality and furthermore, is part of a previously recorded DSF occupied site.

Therefore, the Service determines that take can be avoided on well site #41 provided that appropriate avoidance measures are implemented. The latter are necessary because it was determined that there is suitable habitat nearby the site. These avoidance measures shall include that: 1) construction activities are restricted to the 100' x 100' well site; 2) no spoil material will be stored in adjacent open space areas; 3) Access routes that assure avoidance will be identified by the District with the assistance of a Service biologist; and 4) restoration of the parcel "B" easement with native species typical to the area. The Service does not object to the District proceeding with the proposed well site #41 project, provided that these avoidance measures are implemented.

The Service considers that activities associated with well site #42 will likely result in take of the DSF, based on

the information the Service has obtained to date. As stated above, incidental take associated with habitat disturbance requires authorization under section 10(a) of the Act. The Service recommends that the District submit a 10(a)(1)(B) application package (see enclosure). Once the application is submitted, the target time horizon for the Service to issue a 10(a) incidental take permit for a project of this size is within 90 days. Given this time frame, it may be premature for the District to proceed with awarding a contract for this project.

The Service is available to assist the District and its consultant in the preparation of a 10(a) permit and habitat conservation plan that provides for the conservation of the Delhi Sands flower-loving fly. We also encourage the District's permit application to address other future projects if appropriate. This might save both agencies a great deal of time and expense in the future.

This approach also benefits the long-term conservation planning for the DSF. If we can be of any further assistance or if you have question regarding these comments please contact Jeff Newman of this office at (619) 431-9440.

Sincerely,

/s/ [Illegible]
for
Gail C. Kobetich
Field Supervisor

#1-6-95-HC-022

Enclosure

cc: Fred Worthley, CDFG
Larry Eng, CDFG
Bill Tippets, CDFG

APPENDIX B

INLAND ACTION INC.

[LOGO]

IMPACTS OF MITIGATION
for the
ENDANGERED DELHI SANDS
FLOWER LOVING FLY
on the
SAN BERNARDINO COUNTY MEDICAL CENTER

Prepared by:

INLAND ACTION INC.
Seventh Street
Building 759, Suite 52
San Bernardino, California 92408

Stephen T. Lilburn
Environmental Co-Chairman

OCTOBER 1994

* * *

ABSTRACT

The Endangered Species Act (ESA) as applied to the construction of the San Bernardino County Medical Center resulted in an expenditure of $3,310,199 to mitigate for the presence of eight (8) Delhi Sands Flower-Loving Flies. The effort as negotiated with the U.S. Fish and Wildlife Service and California Department of Fish and

Game resulted in moving and redesigning the facility to provide 1.92 acres of protected habitat for eight flies believed to occupy the site. The effort mitigates only for species on site. Cost per fly amounted to $413,774.25 and resulted in a one year construction delay. This cost is equivalent to the average cost of treatment of 494 inpatients or 23,644 outpatients.

* * *

APPENDIX C

[SEAL]

UNITED STATES DEPARTMENT OF THE INTERIOR

FISH AND WILDLIFE SERVICE

Ecological Service
Carlsbad Field Office
2730 Loker Avenue West
Carlsbad, California 92008

December 13, 1994

Colonel Michal Robinson
District Engineer
Los Angeles District
U.S. Army Corps of Engineers
P.O. Box 2711
Los Angeles, CA 90053-2325

Att: Aaron Allen, Regulatory Branch

RE: San Gabriel Canyon Sediment Management Plan Meeting

Dear Colonel Robinson:

The U.S. Fish and Wildlife Service (Service) met with representatives from the Army Corps of Engineers (Corps), Los Angeles County Department of Public Works (LACDPW), California Department of Fish and Game (CDFG) and consultants from Engineering Science on November 3, 1994 to discuss the significant and adverse impacts the could result from the implementation of the above referenced project. A number of issues were discussed, including the proposed alternatives, mitiga-

tion plans, contaminants, baseline conditions, and possible section 7 consultation for listed or conference for proposed species.

The Service previously reviewed and provided letters of comment, dated September 30, 1994 (draft comments), March 11, 1994, October 5, 1993, and April 5, 1993 on the referenced project. The Department of the Interior (Interior) also provided comments on November 7, 1994 on the referenced project. These letters documented that the proposed project could have unacceptable adverse impacts to fish and wildlife resources and their habitat. The project as currently proposed will result in the direct and indirect loss of aquatic and riparian habitat, native fish and wildlife populations, and decreased water quality. The Service also determined that the draft environmental impact statement prepared for the project was incomplete and inadequate.

There are a number of issues that the Corps and LACDPW need to address in greater detail before proceeding with any of the project alternatives or considering new actions. These issues include: 1) there may be evidence of a viable populations of the Federal category 2 candidate southwestern pond turtles (*Clemmys marmorata pallida*; pond turtle), two-striped garter snake (*Thamnophis hammondii*; garter snake), the Federally proposed endangered arroyo southwestern toads (*Bufo microscaphus californicus*; arroyo toad), and the Federally listed endangered Slender-horned spineflower (*Dodecahema leptoceras*; spineflower); 2) the recent petition for the Service to list the Santa Ana spackled dace (*Rhinichthys osculus*; speckled dace) and Santa Ana sucker (*Catostomus santaanae*) as threatened or endangered. In addition, since submittal of the above refer-

enced letters the Service has listed the Arroyo chub (*Gila ocrutti*) as a Federal category 2 candidate species.

The Service is adamant about the need for current comprehensive surveys of the San Gabriel Watershed. The last surveys of the area were done in the winter of 1992, when many of the sensitive plants and animals were not physically or visually present. Since the last surveys were completed a number of species are being considered for Federal listing or have been formally proposed as a listed species. We have enclosed an updated species list which includes species that may occur in the vicinity of the project site. This list should be provided to LACDPW as well as Engineering Science as a basis for assembling a team of biologists with specific knowledge and ability to identify the species delineated on the list. Until the Service has received the survey results, we will not be able to assist the Corps or LACDPW in determining the least damaging alternatives or assist in developing appropriate mitigation to offset any losses. If listed species may be impacted by the proposed project consultation under Section 7 of the Endangered Species Act will be necessary. The Service recommends that the Corps conference with our agency on all proposed threatened or endangered species.

The Service will discuss the Flow Assisted Sediment Transfer (FAST) alternative from Cogswell to San Gabriel Reservoir (San Gabriel) upon completion of biological surveys that can document the degree of impact associated with this method. We are concerned that the FAST method could impact the West Fork of the river, the most biologically diverse and sensitive portion of the river system. Species that could be impacted by the FAST method include the speckled dace Santa Ana sucker, pond turtle, garter snake, arroyo chub, arroyo

toad, and spineflower. High quality riparian habitat also exists along the banks of the West Fork and could be impacted by the FAST method. The Service needs more scientific evidence that conclusively proves that the FAST method is the least damaging and practical method. The Service is also interested in more information about other sediment removal alternatives (i.e. trucking or dredging) from Cogswell.

The Service is also willing to discuss the proposed alternative for sediment removal from San Gabriel to Morris Reservoir (Morris). This alternative calls for the construction of an earthen sluice channel to facilitate sediment removal. As stated in the Interior comment letters, dated November 7, 1994, and the Service letter, dated September 30, 1994, more information about the sluice channels design, construction, and possible associated impacts need to be provided to the Service before the we can adequately address this alternative.

The proposed alternative to sluice from Morris to the disposal site is unacceptable and mitigation for the loss of biological resources for an approximate 7 mile reach would be infeasible. The Service and CDFG agree that the sluice alternative from Morris is unequivocally the most destructive sediment removal method and that LACDPW must consider other less damaging alternatives.

The Service believes mitigation involving the relocation of viable populations of any species in inappropriate. Relocation mitigation has been proposed for a number of species that could be impacted by the proposed project. The Service is mainly concerned with the proposed relocation of the southwestern pond turtle and the two-striped garter snake. The proposed relocation site for the pond turtle and two-striped garter snakes is the North Fork of the San Gabriel River. The North

Fork of the San Gabriel River is an area highly used by the homeless and is regularly disturbed by off-road vehicle activity and may not be a suitable site for relocation. There are no known populations or current records of pond turtles or two-striped garter snakes inhabiting the North Fork.

The Service thanks you for the opportunity comment on this complex project. Please send all future documents, survey and study results, meeting notices, and pertinent data concerning this project to our attention. Please notify the Service on how you intend to proceed with this project. If you should have any questions pertaining to these comments, please contact Shawnetta Grandberry at (619)-431-9440.

Sincerely,

/s/ [Illegible]
for
Gail C. Kobetich
Field Supervisor

#1-6-95-SP-064

cc: CDFG, San Diego, CA (Attn: Bill Tippets and Tim Dillingham)
CDFG, Long Beach, CA (Attn: Mike Giusti)
EPA, San Francisco, CA (Attn: Harriet Hill)
LACDPW, Alhambra, CA (Attn: Sree Kumer)
Engineering Science, Pasadena, CA (Attn: Jeff Galizio)
Bobby Goodman, Upland, CA

Listed Endangered, Threatened and Candidate Species that May Occur in the Area of the San Gabriel Canyon Sediment Removal Project, Los Angeles County, California (1-6-95-SP-064)

COMMON NAME	*SCIENTIFIC NAME*	*STATUS*
Listed Species		
BIRDS		
Bald eagle	*Haliaeetus leucocephalus*	E
least Bell's vireo	*Vireo bellii pusillus*	E
Peregrine falcon	*Falco peregrinus*	E
coastal California gnatcatcher	*Polioptila californica californica*	T
Western snowy plover (coastal population)	*Charadrius alexandrinus nivosus*	T
PLANTS		
Slender-horned spineflower	*Dodecahema leptoceras*	E
Gambel's watercress	*Rorippa gambellii*	E
Proposed Species		
AMPHIBIANS		
Southwestern Arroyo toad	*Bufo microscaphus californicus*	PE

COMMON NAME	*SCIENTIFIC NAME*	*STATUS*
BIRDS		
Southwestern willow flycatcher	*Empidonax traillii extimus*	PE
PLANTS		
Braunton's milk-vetch	*Astragalus brauntonii*	PE
Candidate Species		
AMPHIBIANS		
Foothill yellow-legged frog	*Rana boylii*	C2
Mountain yellow-legged frog	*Rana muscosa*	C2
Western spadefoot toad	*Scaphiopus hammondii*	C2
BIRDS		
Bell's sage sparrow	*Amphispiza bellii bellii*	C2
California spotted owl	*Strix occidentalis occidentalis*	C2
Ferruginous hawk	*Buteo regalis*	C2
Southern California rufous-crowned sparrow	*Aimophilia ruficeps canescens*	C2
Tricolored blackbird	*Agelaius tricolor*	C2

COMMON NAME	*SCIENTIFIC NAME*	*STATUS*
Western burrowing owl	*Athene cunicularia hypogaeae*	C2
White-faced ibis	*Flegadis chihi*	C2
California horned lark	*Eremophilia alpestris actia*	C3c
FISH		
Arroyo chub	*Gila orcutti*	C2
Santa Ana speckled dace	*Rhinichthys osculus* ssp.	C2
Santa Ana sucker	*Catastomus santaanae*	C2
INSECTS		
Oblivious tiger beetle	*Cicindela latesignata obliviosa*	C2
San Gabriel Mountains blue butterfly	*Plebejus saepiolus* ssp.	C2
San Gabriel Mountains elfin butterfly	*Incisalia mossii* ssp.	C2
Wandering (Salt marsh) skipper	*Panoquina errans*	C2
MAMMALS		
California leaf-nosed bat	*Macrotus californicus*	C2
Greater western mastiff-bat	*Eumops perotis californicus*	C2

COMMON NAME	*SCIENTIFIC NAME*	*STATUS*
Long-legged myotis	*Myotis volans*	C2
Los Angeles pocket mouse	*Perognathus longimembris brevinasus*	C2
Northwestern San Diego pocket mouse	*Perognathus [-chaetodipus] fallax fallax*	C2
San Diego black-tailed jackrabbit	*Lepus californicus bennettii*	C2
San Diego desert woodrat	*Neotoma lepida intermedia*	C2
Southern grasshopper mouse	*Onychomys torridus ramona*	C2
Spotted bat	*Euderma maculatum*	C2
REPTILES		
Coast patch-nosed snake	*Salvadora hexalepis virgultea*	C2
Coastal rosy boa	*Lichanura trivirgata rosafusca*	C2
Coastal western whiptail	*Cnemidorphorus tigris multiscutatus*	C2
San Bernardino ringneck snake	*Diadophis punctatus modestus*	C2
San Diego banded gecko	*Coleonyx variegatus abbotti*	C2
San Diego horned lizard	*Phrynosoma coronatum blainevillei*	C2

COMMON NAME	*SCIENTIFIC NAME*	*STATUS*
Southwestern pond turtle	*Clemmys marmorata pallida*	C2
Two-striped garter snake	*Thamnophis hammondii*	C2
PLANTS		
Nevin's barberry	*Berberis nevinii*	C1
Thread-leaved Brodiaea	*Brodiaea filifolia*	C1
San Gabriel Mountains Dudleya	*Dudleya densiflora*	C1
San Gabriel Mountains manzanita	*Arctostaphylos gabrielensis*	C2
Slender mariposa lily	*Calochortus clavatus* var. *gracilis*	C2
Plummer's mariposa lily	*Calochortus plummerae*	C2
San Fernando Valley Chorizanthe	*Chorizanthe parryi* var. *fernandina*	C2
Parry's spineflower	*Chorizanthe parryii* var. *parryi*	C2
San Gabriel River Dudleya	*Dudleya cymosa* ssp. *crebifolia*	C2
Many-stemmed (-dudleya) live-forever	*Dudleya multicaulis*	C2
San Gabriel bedstraw	*Galium grande*	C2

COMMON NAME	*SCIENTIFIC NAME*	*STATUS*
Palmer's grappling-hook	*Harpagonella palmeri* var. *palmeri*	C2
Smooth spikeweed	*Hemizonia pungens* ssp. *laevis*	C2
Coulter's salt-marsh daisy	*Lasthenia glabrata* ssp. *coulteri*	C2
Humboldt lily	*Lilium humboldtii* var. *ocellatum*	C2
Lemon lily	*Lilium parryi*	C2
Davidson's bush mallow	*Malacothamnus davidsonii*	C2
Gairdner's yampah	*Perideridia gairdneri* ssp. *gairdneri*	C2
Parish's gooseberry	*Ribes divaricatum* var. *parishii*	C2
Los Angeles sunflower	*Helianthus nuttallii* ssp. *parishii*	C2*

E: Endangered
T: Threatened
PE: Proposed Endangered
PT: Proposed Threatened
C1: Category "1" candidate for listing; taxa for which the Service has substantial information to support listing as threatened or endangered.

C2: Category "2" candidate for listing; taxa that may warrant listing but for which substantial information to support a proposed rule is lacking.

C3: Taxa that are not currently being considered for listing as threatened or endangered:

(3a): taxa for which the Service has persuasive evidence of extinction. However, any such taxon is certain to get high priority for listing if rediscovered.

(3b): taxa that currently do not meet the Act's definition of "species". Any such taxon could be reevaluated in the future as a result of subsequent research.

(3c): taxa that apparently more common than previously thought and thus not under current consideration for listing as threatened or endangered.

*: _ May be extirpated.

APPENDIX D

[SEAL]

UNITED STATES DEPARTMENT OF THE INTERIOR

FISH AND WILDLIFE SERVICE

Ecological Services
Sacramento Field Office
2800 Cottage Way, Room E-1823
Sacramento, California 95825-1846

April 12, 1993

In Reply Refer To:
1-1-93-C-20

Mr. Kevin P. Madden
Office of Pipeline and Producer Regulation
Federal Energy Regulation Commission
825 North Capitol Street, N.E., Room 7000B
Washington, D.C. 20426

Subject: Section 7 Conference on Section 4B of the Pacific Gas Transmission Company Pipeline (OPR/DEMEA/ECB, Docket No. CP89-460-000, Pacific Gas Transmission Company)

Dear Mr. Madden:

This responds to your request, dated January 15, 1993, to initiate a conference on a proposal to authorize the construction by the Pacific Gas Transmission Company of Section 4B of the Pacific Gas Transmission Company (PGT)/Pacific Gas and Electric (PG&E) pipeline in Tehama and Glenn Counties, California. At issue are the effects of the proposed construction on the proposed endangered vernal pool fairy shrimp (*Branchinecta lynchi*). This animal was proposed as an endangered species on May 8, 1992 (57 Federal Register 19856). Your request

for conference was received by this office on January 19, 1993. This conference is based on the letter from your office dated January 15, 1993; the mitigation plan prepared by the permittee, dated February 25, 1993; a meeting between Mike Sotak of PG&E, William Van Peters and Allison Jones of Bechtel, Jamie King of the University of California, Rick Brusca of the San Diego Museum of Natural History, Marie Simovich of the University of San Diego, and Jim Browning and Chris Nagano of my staff on December 14, 1992; a meeting between Mike Sotak, William Van Peters, Allison Jones, Jim Browning and Chris Nagano on December 30, 1992; a meeting between Mike Sotak, Allison Jones, Jamie King of the University of California, Jim Browning and Chris Nagano on January 27, 1993; a meeting between Mike Sotak, Allison Jones, Jim Browning and Chris Nagano on February 24, 1993; and several telephone conversations between Mike Sotak, Allison Jones, Jim Browning and Chris Nagano between December 14, 1992 and February 26, 1993.

Conference Opinion

It is our conference opinion that the authorization of the construction of Section 4B the PGT/PG&E pipeline in Tehama and Glenn Counties, California, as proposed, is not likely to jeopardize the continued existence of the proposed endangered vernal pool fairy shrimp. Critical habitat has not been proposed for this species; therefore, none shall be affected.

Description of the Proposed Action

In brief, the Pacific Gas Transmission Company and Pacific Gas and Electric Company propose to construct approximately 845 miles of pipeline from the Canada-

United States border at Kingsgate, British Columbia to the Panoche meter station in Fresno County, California. The pipeline will pass through the states of Idaho, Washington, Oregon, and California. The proposed pipeline would be generally parallel to an existing line constructed in the early 1960's. There are 26.4 miles of Section 4B that will impact five vernal pool complexes containing the vernal pool fairy shrimp. The five sites consist of Sacramento Valley hardpan vernal pools, although northern Sacramento Valley volcanic mudflow vernal pools also are found at Truckee Creek. During field review of this project, 113 vernal pools totaling 2.34 acres were located on the PGT/PG&E Right of Way (ROW). The project, as proposed, would result in the loss of all of these vernal pools. Varying numbers of vernal pools at the five locations were sampled for fairy shrimp with the percentage of pools containing the vernal pool fairy shrimp ranging from 60% to 100% (Table 1 of the Plan).

Please refer to the following documents for a detailed description of the proposed project: 1) *Vernal Pool Plan* prepared by Pacific Gas Transmission Company, Pacific Gas and Electric Company, and Bechtel Corporation, and dated January 1992; and 2) *Branchinecta lynchi Mitigation and Monitoring Plan* (Plan), prepared by the PGT-PG&E Pipeline Expansion Project, and dated February 24, 1993.

To offset adverse impacts to the vernal pool fairy shrimp and its habitat, the project includes a mitigation plan. This plan includes the following provisions (summarized from the Plan):

1. Acquire fee title for 117 acres of vernal pool mitigation habitat containing the vernal pool fairy shrimp.

2. Replace with no net loss of acreage vernal pools in the five vernal pool areas with the vernal pool fairy shrimp.
3. Conduct a worker education program to all field personnel on the importance of protecting vernal pool fairy shrimp habitat.
4. Complete a monitoring plan to evaluate the success of the on-right-of-way vernal pool restoration plan for the vernal pool fairy shrimp.
5. At the end of five years the restoration of the vernal pool fairy shrimp will be considered successful if this species is present and the densities of each of the dominant aquatic invertebrates (maximum of ten species) are present within one standard deviation of the mean of these values for undisturbed pools, adjusted by a factor for the difference between preconstruction on-right-of-way pools and undisturbed off-right-of-way pools.

Species Account/Environmental Baseline

Descriptions of the vernal pool fairy shrimp and information on this species are found in Federal Register 19856-19862, the publication of the proposed rule to list this species as endangered. This crustacean is restricted to vernal pools and swales in California. The vernal pool fairy shrimp has been most commonly observed in grass or mud bottomed swales, earth sump, or basalt flow depression pools. The Plan, Eng *et al.* (1990), and Simovich *et al.* (1992) provide further details on the life history and ecology of the vernal pool fairy shrimp.

Data from the field survey described in the biological assessment indicate that 2.34 acres of vernal pools that are known or are likely to be inhabited by the vernal

pool fairy shrimp occur in the project area. All of these vernal pools would be adversely affected by the proposed project's construction.

Effects of the Action

According to the Plan, 2.34 acres of vernal pools would be lost during construction at the site. Based on the available information, the Service anticipates that all vernal pool fairy shrimp inhabiting 2.34 acres of vernal pools would be lost as a result of project construction. This action is expected to adversely impact the proposed endangered vernal pool fairy shrimp. Full implementation of the Plan would offset adverse impacts to the vernal pool fairy shrimp and its habitat so that the project will not appreciably reduce the likelihood of its survival and recovery.

Cumulative Effects

Cumulative effects are those impacts of future State, local, and private actions affecting endangered and threatened species that are reasonably certain to occur in the action area. This area in Tehama and Glenn Counties is subject to a number of anthropogenic actions, such as rock collecting grazing by cattle, and off-road vehicle use. However, actions of which we are aware at this time together with those addressed in this conference are not expected to appreciably reduce the likelihood of the survival and recovery of the vernal pool fairy shrimp.

Incidental Take

Although the provisions of section 9 of the Act are not applicable to proposed species, specification of conditions on the incidental taking of the vernal pool

fairy shrimp in this conference is intended to provide a basis for compliance with sections 7(b)(4) and 7(o)(2) of the Act. Thus, the terms and conditions set forth below governing incidental take associated with the project are intended to satisfy the requirements of sections 7(b)(4) and 7(o)(2) in the event the vernal pool fairy shrimp becomes listed.

Proposed project actions that may result in the death or injury of the proposed endangered species have been previously discussed in this conference. Loss of vernal pool habitat would be confined to the project boundaries. It is difficult to estimate the number of vernal pool fairy shrimp inhabiting each vernal pool. Because we do not know which of the vernal pools that will be impacted by the proposed project are inhabited by the vernal pool fairy shrimp, we are unable at the present time to precisely determine the number of animals that inhabit each pool. For these reasons, we present the estimate of incidental take of the vernal pool fairy shrimp in terms of the number of vernal pools that will be lost. Based on the available information, the Service anticipates that all vernal pool fairy shrimp inhabiting 2.34 acres of vernal pools would be lost as a result of project construction.

We believe the following measures are required to minimize the impacts of incidental take on the vernal pool fairy shrimp:

1. All vernal pool fairy shrimp habitat adjacent to the project site should be avoided during and following construction.

2. The permittee should acquire fee title for compensation habitat for the vernal pool fairy shrimp.

   a. Within twelve (12) months of the date of this conference, the permittee should acquire fee-title

for one hundred and seventeen (117) acres of vernal pool fairy shrimp habitat, as described in the Plan. The lands acquired should be acceptable to the Service. The fee-title should be given to an acceptable resource agency or conservation organization such as The Nature Conservancy or the Center for Natural Lands Management.

b. Conference should be reinitiated with the Service if 117 acres of vernal pool fairy shrimp habitat that is acceptable to the Service is not acquired within 12 months from the date of this document.

3. The permittee should undertake the following to confine loss of the vernal pool fairy shrimp to the project site:

a. All mitigation and monitoring measures described in the Plan should be fully implemented.

b. Biologists and law enforcement personnel from the California Department of Fish and Game and the Service should be given complete access to spread 4B of the Pacific Gas Transmission Company Pipeline project to monitor construction and mitigation activities. Personnel from both these agencies shall be given complete access to the site to monitor the vernal pool fairy shrimp and its habit in perpetuity.

c. Conference or formal consultation, as appropriate, should be reinitiated five years from the date that construction is initiated on spread 4B if the mitigation is not successful, as described in the Plan.

The Services should be notified within 3 working days of the finding of any dead vernal pool fairy shrimp. The Service contact persons for this information are

Chris Nagano and Jim Browning (916/978-4866). Any vernal pool fairy shrimp found injured or dead should be deposited in the San Diego Museum of Natural History. The agency contact is Dr. Rick Brusca (619/232-3821).

Conservation Recommendations

Section 7(a)(1) of the Act directs Federal agencies to utilize their authorities to further the purposes of the Act by carrying out conservation programs for the benefit of endangered and threatened species. The term "conservation recommendations" has been defined as suggestions from the service regarding discretionary measures to minimize or avoid adverse effects of a proposed action on listed species or critical habitat or regarding the development of information. Measures generally recommended have been incorporated into the mitigation plan for the proposed project. We do not have any conservation recommendations for the proposed project at this time.

This concludes conference on work described in the vernal pool plan, and the Plan. Reinitiation of formal conference should be requested if new information reveals effects of the actions that may affect the species in a manner that was not considered in this conference. The Federal Regulatory Energy Commission (FERC) should request the Service to adopt this conference as a biological opinion pursuant to 50 CFR §402.10(d) if the vernal pool fairy shrimp is listed under the Act. Initiation of formal consultation should be initiated by FERC if the animal is listed and new information reveals effects of the actions may affect the species or critical habitat in a manner that was not considered in this conference, and/or if other species are listed or critical

habitat designated that may be affected by the action. If you have any questions regarding this opinion, please contact Chris Nagano or Jim Browning of my staff at the letterhead address or at 916/978-4866.

Sincerely

/s/ James D. Carson
for Wayne S. White
Field Supervisor

cc:
Supervisor, Environmental Services, California Department of Fish and Game, Sacramento, 1416 Ninth Street, Sacramento, CA 95814.

APPENDIX E

[LOGO]

THE CITY OF SAFFORD

UTILITIES DEPARTMENT

P.O. Box 272 – Safford, Arizona 85548 – (602) 348-3143

2 March, 1995

Mayor, Van Talley
City of Safford
P.O. Box 272
Safford, Ariz. 85548-0272

R.E. Bonita Project – Cost of Compliance

Dear Mayor Talley,

The following is a brief narrative of compliance issues that were mandated by U.S. Fish and Wildlife on the Bonita water system project. These mandates were followed in order to restore the Bonita water system. As you know, the Bonita water production system is vital not only to the City of Safford but to the entire area. The system serves a minimum of 18,000 people, from Central, East to San Jose, including the State Prison.

1. The disastrous flood of January, 1993 severely damaged the Bonita water system. As soon as the flood waters receded, City forces secured an Engineer, emergency repairs were started. Emergency efforts to produce water from expensive backup wells were implemented. FEMA was on hand immediately to assist with emergency funding.

2. At this time, U.S. Fish and Wildlife shut the project down, because the area had been designated as a critical habitat for the razorback sucker. The shut down resulted

in a delay of reconstruction for 6 months. In the meantime all emergency wells were in production, at great cost to the City of Safford.

3. City staff worked several weeks with FEMA, U.S. Army Corp. of Eng., ADEQ and the City's consultants, Engineers Inc. securing permits and developing a plan of action that was suitable to U.S. Fish and Wildlife.

4. As part of the plan of action, temporary culverts were installed at every creek crossing. In an effort to keep vehicular traffic from crushing minnows. At great effort, no equipment entered the creek. All work was performed outside the stream flow.

5. Part of the plan of action called for rock filter beds placed just below the construction area in an effort to prevent silt from irritating the gills of minnows and to maintain water that was suitable for fish reproduction. Filters and fish screens were also installed at upper culvert crossings to prevent minnows from traveling upstream to the construction site.

6. During the shutdown, an environmental assessment of the area was conducted. Specialists from BLM were used. FEMA contracted with Eco Plan Associates, a private environmental consulting firm, to perform a preliminary assessment. Minnows in the creek were shocked and removed to safe locations, downstream by BLM specialists and crews of City personnel.

7. City personnel monitored the creek flow 5 times per day, during all reconstruction, insuring that turbidity levels in the creek water did not exceed 50 NTU.

8. A water truck was rented and a driver hired to keep the access roads watered so that dust would not interfere with reproduction efforts of the bird population. As a matter of interest, construction crews, including myself

noted and took pictures of deer, javelina and wild turkeys, watering at the construction site, all during construction. It was also noted by BLM fisheries biologists that there were no razorback suckers in the creek nor could they survive in the creek, under normal conditions.

9. The City installed 300 gallon trash barrels at key locations and a 5 yard dump truck was rented to insure that trash was cleaned up and hauled out. Any equipment fluid spills were quickly removed, including the dirt by City forces and hauled from the canyon.

10. It was determined that no equipment used could have any fluid leaks. As a result, staff spent considerable time investigating equipment rental agencies in an effort to rent equipment that met the criteria demanded by the project.

11. Equipment was rented that employed the use of plastic "diapers" underneath, to prevent any possible fluid leaks from contacting the soil or stream flow. Only new or very near new equipment was rented, in an effort to insure that no fluid leaks would be presented to the project. Equipment costs to date are approximately $5 million. It is estimated that at least 5% of this cost could have been saved if some local equipment were used and new equipment from outside the valley was not rented. There are no estimates available as to adverse impacts to the local economy because local equipment did not meet U.S. Fish and Wildlife standards. Insurance premiums were higher because of the liability exposure to environmental regulations.

12. Contracts were made with the equipment rental agencies, employing custom equipped service trucks, that vacuumed all oils from equipment and pumped

new replacement oils into the equipment. City crews spent extra time maintaining temporary access roads to all equipment so that the custom service trucks could access all equipment.

13. There were 9 portable toilets placed at key locations, personnel were strictly advised to use only these toilets, in an effort to prevent any possible pollution of the creek.

14. In an effort to comply with all regulations, a DSR for $106,000.00, to be used for riparian habitat restoration has been written by FEMA, to the City of Safford.

Staff has not had sufficient time to compile an accurate Cost of Compliance from records. An accurate cost would be available in approximately 30 days. However, after carefully reviewing the chain of events and some records, the estimated Cost of Compliance is $1,090,-620.00.

If you have further questions, or need more information, please feel free to call.

Sincerely,

/s/ Mike Squire
Mike Squire, Util. Op. Supt.

APPENDIX F

Documents Pertaining to
Emergency Breach Management Plan
Fire Island, New York

Application of Regional Director Ray E. Cowen, P.E., New York State Department of Environmental Conservation, for a Permit under New York State Environmental Conservation Law (ECL) regarding Protection of Water, Water Quality Certification, Tidal Wetlands and Coastal Erosion Management (May 2, 1994)

Draft Interim Breach Management Plan, Fire Island National Seashore, New York (Aug. 25, 1994)

Mario M. Cuomo, Governor; Gail S. Shaffer, Secretary of State; Langdon Marsh, Commissioner, Environmental Conservation, GOVERNOR'S COASTAL EROSION TASK FORCE, FINAL REPORT – Summary of Recommendations (Sept. 1994)

Susan P. Elias-Gerken, James D. Fraser and P.A. Buckley, PIPING PLOVER HABITAT SUITABILITY ON CENTRAL LONG ISLAND, NEW YORK BARRIER ISLANDS – FINAL REPORT SUBMITTED TO THE NATIONAL PARK SERVICE (Sept. 1994)

Letter to Kevin R. Dubois, U.S. Fish & Wildlife Service, from Charles T. Hamilton, Natural Resources Supervisor, New York State Department of Environmental Conservation (Feb. 28, 1995)

(17)

MAR 24 1995

OFFICE OF THE CLERK

No. 94-859

In the

Supreme Court of the United States

October Term, 1994

Bruce Babbitt, Secretary of the Interior, et al.,

Petitioners,

v.

Sweet Home Chapter of Communities for a Great Oregon, et al.,

Respondents.

On Writ of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF OF WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION AND FAIRNESS TO LAND OWNERS COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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March 24, 1995

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In the

Supreme Court of the United States

October Term, 1994

No. 94-859

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.,
Petitioners,

v.

SWEET HOME CHAPTER OF COMMUNITIES
FOR A GREAT OREGON, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District Of Columbia Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION AND FAIRNESS TO LAND OWNERS COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF AMICI

The Washington Legal Foundation ("WLF") is a nonprofit public interest law and policy center based in Washington, D.C., with over 100,000 supporters nationwide.[1] WLF regularly appears before federal and state courts promoting eco-

[1] By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

nomic liberty, free enterprise principles and limited and accountable government. WLF has devoted substantial resources to litigating issues where liberty, both individual and economic, is at risk from the criminalization of conduct not traditionally thought to be unlawful, especially in the environmental area. The Allied Educational Foundation ("AEF") is a nonprofit charitable and education foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in law and public policy. The Fairness to Land Owners Committee ("FLOC") is a Maryland-based national organization with over 8,000 members who are small property owners faced with confiscatory and arbitrary land use regulations involving wetlands, endangered species and similar laws. Both AEF and FLOC have appeared with WLF in land use cases before this Court. *See, e.g., Lucas v. South Carolina Coastal Council,* 112 S. Ct. 2887 (1992); *Dolan v. City of Tigard,* 114 S. Ct. 2309 (1994).

SUMMARY OF ARGUMENT

Petitioners plead for deference to their broad interpretation of Section 9 of the Endangered Species Act of 1973 (the "ESA"), Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-1544 (1988)), which makes it unlawful to "take" an endangered species. Respondents urge that Congress did not intend that the term "harm" embedded in the statutory definition of "take" be expanded to make unlawful "habitat modification" associated with such traditional land uses as farming or forestry. *Amici* urge that the Rule of Lenity — which states that any ambiguity in a statute or regulation with criminal application should be resolved in favor of defendants — governs this case if this Court finds the statute ambiguous.

STATEMENT OF THE CASE

Amici recapitulate the procedural history of this case only to demonstrate that concerns underlying the Rule of Lenity —

such as fair warning of prohibited conduct and the unintended criminalization of day-to-day activities — infuse this case from start to finish. If none of the courts or judges below that addressed the issue could agree on whether the ESA prohibits habitat modification, what notice do innocent landowners have of the conduct proscribed?

Section 9 of the ESA makes it unlawful for any person to "take" any listed species of fish or wildlife. 16 U.S.C. § 1538(a)(1)(B). Section 9 contains no prohibition on the modification of the habitat of threatened or endangered species and the term "take" is defined elsewhere in the ESA only to mean

> to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

16 U.S.C. § 1532(19).

Despite the absence of any reference to habitat modification in the definition of "take," Petitioners, by regulation, defined the term "harm" in the definition of "take" in its broadest possible terms as follows:

> *Harm* in the definition of "take" in the [ESA] means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3.

With the force of this sweeping definition behind it, Petitioners have used the harm regulation to stymie a variety of lawful land uses such as residential development, timber har-

vest and farming and to threaten private landowners with criminal prosecution for taking a listed species if they engage in "modification" of its "habitat." *See* Albert Gidari, *The Endangered Species Act: Impact of Section 9 on Private Landowners*, 24 Envtl. L. 419 (1994).

In the words of Petitioners, the "harm" form of a prohibited "take" includes "unintentional destruction of a listed species or its habitat by heavy equipment during home construction or land use activities." *See* Preliminary Draft Handbook for Habitat Conservation Planning and Incidental Take Permit Processing, U.S. Department of the Interior, U.S. Fish & Wildlife Service 80 (Sept. 15, 1994) (availability announced in 59 Fed. Reg. 65,782-83 (Dec. 21, 1994)) (emphasis in original). Indeed, to Petitioners, the "harm" form of prohibited "take" not only can be unintentional, it can be "inadvertent."[2] *Id.* at 4.

Respondents "are various organizations, businesses and individuals, who depend directly or indirectly on the timber industry in the Pacific Northwest and in the Southeast for their livelihood." *Sweet Home Chapter of Communities for a Great Or. v. Lujan*, 806 F. Supp. 279, 281 (D.D.C. 1992). They brought this citizen's suit under Section 11(g) of the ESA to challenge the agency's sweeping definition of "harm," a definition that puts innocent landowners at risk of criminal prosecution.

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[2] "Inadvertent," of course, means "accidental." *The American Heritage Dictionary* 649 (2d college ed., 1985). Petitioners' interpretation reads out of the ESA the requirement that "take" be knowing, 16 U.S.C. § 1540(b), and ignores that accident is a defense to a general intent crime. *See, e.g., United States v. St. Onge*, 676 F. Supp. 1044, 1045 (D. Mont. 1988) (accident as defense to charge of shooting listed species). *See infra* at 12-13. More to the point here, innocent landowners are at substantial risk of running afoul of the ESA under such a strict liability interpretation of the statute.

The district court sustained the harm regulation, holding that take "encompasses habitat modification." *Id.* at 285. The court noted that even if the ESA was silent or ambiguous, it would uphold the regulation as a "reasonable interpretation of the statute." *Id.* (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984)).

The district court was not detained by arguments that because the ESA was a penal statute, Congress must "'define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Id.* at 285 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). Under the court's view, to avoid conduct leading to "harm" and therefore criminal conviction for prohibited take, an ordinary person would be required to conduct "an evaluation of the species involved, the biological needs of that species, and the degree of habitat modification [permissible], all of which are readily ascertainable" at least according to the court. *Id.* at 286.

The court of appeals affirmed the district court *per curiam*, concluding that such concerns "can be addressed when and if they are properly raised in the framework of a concrete challenge to a particular application of the regulation." *Sweet Home Chapter of Communities for a Great Or. v. Babbitt*, 1 F.3d 1, 3-5 (D.C. Cir. 1994). On appeal, Respondents again emphasized that a broad construction of the harm regulation "left to the whims and predictions of biologists to determine when a habitat modification is '*significant*' and when such a modification '*significantly* impair[s] *essential* behavioral patterns.'" *Id.* at 4. Respondents' concern was that "[p]roperty owners . . . will thus be subject to criminal sanctions under the ESA based on 'some biologist's subjective view.'" *Id.* at 4-5.

Writing in concurrence, Chief Judge Mikva additionally relied on the *Chevron* analysis to uphold the regulation. *Id.* at 8.

Placing the burden on Respondents, he concluded that "[o]verall, there is nothing in the ESA itself or in its legislative history that unambiguously demonstrates that the term 'take' does not encompass habitat modification." *Id.* at 11. He viewed *Chevron* as a "command" to defer to the agency's interpretation of the statute, apparently notwithstanding its criminal application. *Id.*

Judge Williams concurred, but only because he viewed the 1982 ESA amendments, which authorized permits to take listed species in conjunction with otherwise lawful activities, as supporting an *inference* that the take prohibition encompassed habitat modification. *Id.* Otherwise, applying traditional tools of statutory construction, he would have invalidated the regulation. *Id.*

Judge Sentelle dissented. Applying *Chevron*, he concluded that there was no reasonable way that the term harm in the definition of take could include habitat modification:

> I have in my time seen a great many farmers modifying habitat. They modify by plowing, by tilling, by clearing, and in a thousand other ways. At no point when I have seen a farmer so engaged has it occurred to me that he is taking game. Nor do I think it would occur to anyone else that he was taking wildlife. He may be doing something harmful to wildlife, but he is not "taking" it.

Id. at 12.

Respondents petitioned for rehearing. On further consideration, Judge Williams conducted an exhaustive review of the 1982 ESA amendments and determined that the best that could be said is that the amendments supported an *inference* that "*some* prohibited takings are 'incidental' to otherwise lawful activities." *Sweet Home Chapter of Communities for a*

Great Or. v. Babbitt, 17 F.3d 1463, 1467 (D.C. Cir. 1994) (emphasis in original). But, Judge Williams noted, "It does not follow, however, that such incidental takings include the habitat modifications embraced by the [Petitioners'] definition of 'harm.'" *Id.* Thus, the court reversed, invalidating the harm regulation as "neither clearly authorized by Congress" nor a "reasonable interpretation of the statute." *Id.* (citing *Chevron*, 467 U.S. at 842-44).

The court emphasized that the ESA was a criminal statute and the regulatory definition of the term "harm" potentially applied to "[a] farmer who harvests crops or trees on which a species may depend" so that "if the benefit [of the habitat] withdrawn be important, then the regulation sweeps up the farmer's decision." *Id.* at 1464-65. To avoid this strange result, the court applied the maxim *noscitur a sociis* — words should be known by the company they keep — to avoid giving unintended breadth to the statute. *Id.* at 1465.

Judge Mikva dissented, complaining that the majority "jettison[ed] the *Chevron* standard." *Id.* at 1473. He maintained that the ESA and its legislative history are silent or at best ambiguous as to the scope of the term "harm." *Id.* at 1473-74. He would have given substantial deference to the agency because "[t]ies are supposed to go to the dealer under *Chevron*," apparently even in criminal enforcement actions. *Id.* at 1473.

Petitioners sought rehearing en banc, contending that the court of appeals interpreted the regulation more broadly than the agency and demanding to know under what step of the *Chevron* analysis the court decided the case. The court denied the petition. Announcing that its decision rested on Step 1 of the *Chevron* analysis, the court concluded that "the statute, fairly read in the light of the traditional tools of statutory interpretation, manifests a clear determination by Congress that the prohibitions of § 9 should not reach habitat modification

as defined by the Department, where there is no direct action by the defendant against any member of the species." *Sweet Home Chapter of Communities for a Great Or. v. Babbitt*, 30 F.3d 190, 193 (D.C. Cir. 1994) (internal quotations omitted). The court also noted that "the factors involved in the first 'step' are also pertinent to whether an agency's interpretation is 'reasonable.'" *Id.*

Judge Silberman dissented from the denial of rehearing en banc. In his dissent, he observed:

> Keeping in mind that we are dealing with a criminal statute, I am not at all sure that *Chevron* even governs our review. *Cf. United States v. Thompson/Center Arms Co.*, 119 L. Ed. 2d 308, 112 S. Ct. 2102, 2110 & nn. 9 & 10 (1992) (plurality opinion). That is to say, the *Chevron* presumption that Congress has delegated to the administrative agency primary authority to reconcile ambiguities in statutory language — may not apply when the statute contemplates criminal enforcement. *Cf. Kelly v. EPA*, 15 F.3d 1100, 1107 (D.C. Cir. 1994).

Id. at 194.

It is on this issue that *Amici* write. Judge Silberman was correct in raising the Rule of Lenity issue and this Court can affirm on that ground. *See Thigpen v. Roberts*, 468 U.S. 26, 28 (1984) ("we may affirm on any ground that the law and the record permit and that will not expand the relief granted below") (citing *United States v. New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977)).

ARGUMENT

I. THE RULE OF LENITY GOVERNS REVIEW OF STATUTES OF CRIMINAL APPLICATION AND REGULATIONS PROMULGATED THEREUNDER

In all cases, when the statute is clear, a court must give effect to the unambiguously expressed intent of Congress. *Ratzlaf v. United States*, 114 S. Ct. 655, 662-63 (1994) (when text of statute criminalizing willful structuring of currency transactions is clear, lenity does not apply). But different concerns are raised when a court reviews an *ambiguous* statute with criminal application.

The Rule of Lenity "is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited." *Dunn v. United States*, 442 U.S. 100, 112 (1979) (citations omitted). Thus, after applying the ordinary tools of statutory construction, if a court is left with an ambiguous statute, the Rule of Lenity applies to resolve the ambiguity in the defendant's favor. *United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2109-10 (1992) (plurality opinion).

The Rule of Lenity has long been employed by this Court as a tool of statutory construction in the context of criminal statutes. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 94 (1820) (Marshall, J.) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself.").[3] Since the dawn of the modern administrative

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[3] *See also Black's Law Dictionary* 1196 (5th ed. 1979); Daniel A. Per-Lee, annot., *Supreme Court's Views as to the "Rule of Lenity" in the Construction of Criminal Statutes*, 62 L. Ed. 2d 827 (U.S. Supp. 1995); 3 *Sutherland Statutory Construction* §§ 59.02-03 (Norman J. Singer ed., 5th ed. 1992).

state, this Court uniformly has relied on or considered the Rule of Lenity to resolve ambiguity in statutes with criminal application without considering or giving deference to agency interpretation. *See, e.g., United States v. Granderson,* 114 S. Ct. 1259 (1994); *Thompson/Center,* 112 S. Ct. 2102; *Williams v. United States,* 458 U.S. 279 (1982); *United States v. Bass,* 404 U.S. 336 (1971); *see also* Daniel A. Per-Lee, annot., *Supreme Court's Views as to the "Rule of Lenity" in the Construction of Criminal Statutes,* 62 L. Ed. 2d 827 (U.S. Supp. 1995).

Lenity is the applicable rule when the statute has criminal application, whether the ambiguity arises in a criminal proceeding or in a civil setting. *Id.; see also Crandon v. United States,* 494 U.S. 152, 168 (1990) (applying lenity in interpreting a criminal statute invoked in a civil action). As this Court has noted:

> [Lenity] is not a rule of administration calling for courts to refrain in criminal cases from applying statutory language that would have been held to apply if challenged in civil litigation.

Thompson/Center, 112 S. Ct. at 2110 n. 10.

The Rule of Lenity has been used in tandem with general notions of fairness to avoid criminalizing otherwise innocent behavior. *See Williams v. United States*, 458 U.S. 279, 290 (1982) (rejecting interpretation of statute making it a federal offense to write a check with insufficient funds because it would "render a wide range of conduct violative of federal law"); *see also United States v. Kozminski*, 487 U.S. 931, 951 (1988) (lenity applies when interpretation "would appear to criminalize a broad range of day to day activity"); *Liparota v. United States*, 471 U.S. 419, 426 (1985) (lenity applies when "to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct").

From these established precedents, it is clear that this Court resolves ambiguity in statutes with criminal application in favor of the person whose innocent conduct might otherwise be swept up in the rush to give deference to an agency interpretation. These precedents guide this Court for good reason — with an agency unaccountable to the electorate. As Justice Scalia has noted, the "temptation to stretch the law to fit the evil is an ancient one, and it must be resisted." *Moskal v. United States*, 498 U.S. 103, 132 (1990) (Scalia, J., dissenting).

A. Harm by Habitat Modification Has Been, and Will Continue To Be, Prosecuted as a Criminal Offense.

The ESA is a criminal statute. Violation of it or Petitioners' regulation at issue here carries substantial criminal sanctions:

> Any person who knowingly violates, . . . any provision of this chapter, or any provision of any . . . regulation issued in order to implement subsection . . . (a)(1) . . . (B) . . . of section 1538 of this title [prohibiting "take"] *shall upon conviction, be fined not more than $50,000 or imprisoned for not more than one year, or both.*

16 U.S.C. § 1540(b) (emphasis added).

In addition to fines and imprisonment, the ESA authorizes criminal forfeiture:

> All guns, traps, nets, and other equipment, vessels, vehicles, aircraft, and other means of transportation used to aid the taking, possessing, selling, purchasing, offering for sale or purchase, transporting, delivering, receiving,

> carrying, shipping, exporting, or importing of any fish or wildlife or plants in violation of this chapter, any regulation made pursuant thereto, or any permit or certificate issued thereunder shall be subject to forfeiture to the United States upon conviction of a criminal violation pursuant to subsection (b)(1) of this section.

16 U.S.C. § 1540(e)(4)(B); *see Sammons v. Commissioner*, 838 F.2d 330, 336 (9th Cir. 1988); *United States v. 2,507 Live Canary Winged Parakeets*, 689 F. Supp. 1106, 1120 (S.D. Fla. 1988).

The ESA's criminal penalties may be enhanced by application of the Sentencing Reform Act of 1984. *See, e.g., United States v. Tran*, 955 F.2d 288 (5th Cir.) (applying Title 18 U.S.C. app. 4, § 2Q2.1 to increase penalty for ESA violation because the one species taken was substantial relative to overall population), *cert. denied*, 113 S. Ct. 127 (1992). Similarly, the Criminal Fines Improvements Act of 1987 may result in significantly higher criminal fines, up to $100,000 per violation for individuals, 18 U.S.C. § 3571(b)(5), and up to $200,000 per violation by a corporate violator.[4] 18 U.S.C. § 3571(c)(5).

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[4] In addition, under the Lacey Act, any person who

> knowingly imports or exports any fish or wildlife or plants in violation of any provision of this Act . . . knowing that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation, shall be fined not more than $20,000, or imprisoned for not more than five years, or both.

16 U.S.C. § 3373(d)(1)(A). The Lacey Act is often used in tandem with, or in lieu of, the ESA misdemeanor provisions to obtain a felony convic-

In 1978, Congress amended the ESA to lessen the intent standard for a violation of the "take" prohibition by requiring only a *knowing* act as opposed to a *willful* one. *See* Pub. L. No. 95-632, § 6, 92 Stat. 3751 (1978). Now, the intent standard is the same for both criminal and civil violations, whether in cases for injunctive relief or in criminal proceedings, and the body of law developed in the civil context informs criminal proceedings. *Compare* 16 U.S.C. § 1540(a)(1) (civil penalties) *with* 16 U.S.C. § 1540(b)(1) (criminal penalties).

The "knowing" standard has been interpreted to mean that the prosecution need prove only that the defendant had the general intent to carry out the proscribed conduct. *See, e.g., United States v. Nguyen*, 916 F.2d 1016, 1020 (5th Cir. 1990) (defendant need only have intended to possess a turtle, rather than to know that the turtle possessed was endangered); *United States v. St. Onge*, 676 F. Supp. 1044 at 1045 (defendant need only have intended to shoot his gun; no defense that he did not know the animal was endangered or threatened); *United States v. Billie*, 667 F. Supp. 1485, 1492-93 (S.D. Fla. 1987) (same).[5]

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tion and enhanced penalties when the conduct violates state law as well as the ESA. *See, e.g., United States v. Doyle*, 786 F.2d 1440 (9th Cir.) (affirming conviction under Lacey Act for violating state wildlife permit, but reversing conviction under ESA for insufficient evidence), *cert. denied*, 497 U.S. 984 (1986). Thus, violations under the ESA may be prosecuted as criminal misdemeanors or felonies, depending on the circumstances.

[5] These cases apparently rest upon the legislative history to the 1978 amendments to the ESA. A committee report noted that the ESA did "not intend to make knowledge of the law an element of either civil penalty or criminal violations of the Act." *See* H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 26, *reprinted in* 1978 U.S.C.C.A.N. 9484, 9493. Of course, knowingly shooting a gun at an animal is different in kind than knowingly plowing one's field.

The General Accounting Office reports that there have been 126 criminal prosecutions under the ESA for violations of the "take" prohibition. General Accounting Office, *Endangered Species Act: Information on Species Protection on Nonfederal Lands*, GAO/RCED-95-16, at 11-12 (1994) [hereinafter the "GAO Report"]. Of these, at least seven were brought on the basis of "habitat modification" on non-federal lands, although the cases are not identified and the details of the conduct leading to criminal prosecution are not discussed in the GAO Report. *Id.* at 13. Several criminal prosecutions for habitat modification have been reported widely, however.

In 1987, the City of Rancho Palos Verdes, California, was criminally prosecuted for taking an endangered butterfly by destroying its habitat. *United States v. City of Rancho Palos Verdes*, 841 F.2d 329, 330 (9th Cir. 1988). The City successfully defended the criminal charge on the basis that, as a municipal corporation and a political subdivision of the State, it was not a "person" under the ESA. *Id.* The ESA subsequently was amended to resolve the ambiguity of who could be prosecuted, Pub. L. No. 100-478, § 1001, 102 Stat. 2306 (1988), so that municipalities as well as any "individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government [or] of any State" are now at risk of criminal prosecution for alleged habitat modification of a listed species. 16 U.S.C. § 1532(13).

It is now a common tactic for Petitioners to threaten public entities and officials for issuing permits for ordinary and lawful land use activities that, in Petitioners' judgment, result in harm to a listed species through habitat modification. *See* Robert D. Thornton, *Takings Under the Endangered Species Act Section 9*, 4 Nat. Resources & Env't 50-51 (Spring

1990).[6] Petitioners generically threatened public officials and landowners alike in the "informal" guidelines for authorizing or conducting timber harvesting and related activities in and around activity centers of the threatened northern spotted owl.[7] *See* U.S. Fish and Wildlife Service, Region 1, Procedures Leading to Endangered Species Act Compliance for the Northern Spotted Owl (July 1, 1990) [hereinafter the "Guidelines"]. Petitioners included this admonition for permitting agencies: "Because the states authorize private timber harvest, they may be party to take on private lands, as well as on state lands." *Id.* at 13.

Petitioners' actions are not confined to the Pacific Northwest. In January 1992, three civilian employees of the Department of the Army were indicted for allegedly taking endangered Red-Cockaded Woodpeckers by authorizing an oth-

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[6] For example, Thornton reports that the U.S. Fish and Wildlife Service (the "FWS") sent a letter to a city in California that proposed to zone certain property for development in the habitat of an endangered species, stating:

> Section 9 of the Endangered Species Act of 1973 . . . makes it unlawful for any person to take an endangered species without a permit. . . . Section 11 of the Act prescribes civil penalties of up to $10,000, or imprisonment for up to one year, or both, for knowingly violating any provision of the Endangered Species Act. . . . [W]e must advise you, unless you first secure a section 10(a) permit authorizing the incidental take. . . , the approval and implementation of the proposed action may subject . . . city officials to investigation by our law enforcement branch regarding potential violations of the Endangered Species Act.

Id. at 51.

[7] The Guidelines are discussed in detail below, *see infra* at 19-20.

erwise lawful commercial harvest on a military installation. *See* Indictment, *United States v. Dunn et al.*, Crim. No. 92-117-COL (JRE) (M.D. Ga., filed Jan. 28, 1992). There were no allegations of dead or physically injured woodpeckers and the only "harm" alleged was permitting the harvest of known nesting and cavity trees where woodpeckers *could* nest, thereby leaving woodpecker colonies in the vicinity without sufficient habitat in which to forage. *Id.* at 6-8.

Widely reported is the federal case against a Taiwanese farmer near Bakersfield, California, who was indicted for discing his field. *United States v. Wang Lin Farms, Inc. & Taung Ming-Lin,* CR-F-94-5041 SSH (E.D. Cal., filed Mar. 23, 1994) [hereinafter the "*Lin Farms Indictment*"]. It was reported that on February 20, 1994, a squadron of two dozen state and federal agents, accompanied by helicopters, descended on Lin's farm, seized his tractor and disc, and arrested him for violating the ESA; his farm was home to the endangered Tipton Kangaroo Rat.[8] *See, e.g.,* Chicago Tribune, May 30, 1994, N11.

The indictment is most instructive. *See* Appendix A. The government alleged that defendant "did knowingly take an endangered species of wildlife, to wit: Tipton Kangaroo Rats, by discing habitat essential to the survival of the Tipton Kangaroo Rats." *Lin Farms Indictment* at 1-2.

This is a truly remarkable indictment given that habitat essential to the survival of a listed species is the definition of critical habitat, 16 U.S.C. § 1532(5), and the ESA only prohibits the government, not private persons, from modifying critical habitat. *See* 16 U.S.C. § 1536(a)(2). Petitioners deny

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[8] *See* 53 Fed. Reg. 25,608 (Jul. 8, 1988) (codified at 50 C.F.R. pt. 17) (listing as endangered and determining not to designate critical habitat at the time of listing).

before this Court that the ESA can, has or will be enforced in this way, Pet. Br. at 16, 45-49, but their actions speak louder than their words, and the court below was correct in noting precisely this circumstance. *Sweet Home*, 30 F.3d at 192 (Judge Williams noted that "the government misrepresents" its position on the effect of destruction of critical habitat for grizzly bears).

The government filed a superseding indictment (*see* Appendix B), deleting the "essential habitat" element as to the rat, but adding two more counts of unlawful taking, one for the San Joaquin Kit Fox and another for the Blunt-Nosed Leopard Lizard; three counts in all from the same single act of farming. *United States v. Wang Lin Farms, Inc. & Taung Ming-Lin*, CR-F-94-5041 SSH (E.D. Cal. filed May 24, 1994). While still purporting to rely on a definition of "harm" meaning "an act which actually kills or injures wildlife," 50 C.F.R. § 17.3, the government did not allege any dead or injured rats, foxes or lizards. Early reports indicated that the government did not know whether some rat parts seized from the field in the midnight raid were from the listed rat because "the only thing that distinguishes them from the Herman's Kangaroo rat, for instance, [which is not listed] is that their rear feet are 1-100th of an inch longer."[9] Chicago Tribune, May 30, 1994, N11.

To be clear that the *Lin Farms Indictment* is about habitat modification, one need only read the reported public statements of the prosecuting Assistant U.S. Attorney: "We're

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[9] Petitioners have the authority under the ESA to treat species with such similarity of appearance as if they were listed "when enforcement personnel would have substantial difficulty in attempting to differentiate between the listed and unlisted species." 16 U.S.C. § 1533(e)(A)-(C). Petitioners have listed no other rats similar in appearance to the Tipton Kangaroo Rat.

enforcing the Endangered Species Act. This was an unlawful and knowing take of *habitat*." Los Angeles Times, June 10, 1994, A1, col. 1 (emphasis added). The prosecutor's statement was echoed later by the Regional Director of the FWS in a letter to the editor where he confirmed that the charges against the farmer were for a "knowing take of endangered species *by discing habitat of listed species*." Sacramento Bee, June 27, 1994, B13 (emphasis added).

The U.S. Attorney has since dropped the charges against Lin personally, and his tractor, but has maintained charges against Lin's company in yet another superseding indictment. *See* Appendix C; *United States v. Wang Lin Co.*, CR-F-94-5041 SSH (E.D. Cal., filed Jan. 12, 1995); *see also* Los Angeles Times, July 1, 1994, A26, col. 1; The Fresno Bee, Jan. 18, 1995, A1. The trial reportedly is scheduled to commence in May 1995. San Francisco Chronicle, Jan. 19, 1995, A15; The Fresno Bee, Feb. 7, 1995, B2 & March 7, 1995, B2.

As these cases demonstrate, the ESA has been and will continue to be enforced as a criminal statute even when there is no proof of actual death or physical injury to an identifiable listed species so long as the government is allowed to treat ordinary land uses as unlawful habitat modifications.

B. The Harm Regulation Has Been Applied Broadly by Petitioners, Reaching Many Types of Ordinary Land Use Activities, Treating Them as Unlawful Habitat Modification.

As the above examples of criminal prosecution for habitat modification demonstrate, there is a great and very real risk to private landowners who engage in traditional land use activities in or around the habitat of threatened or endangered species. Contrary to Petitioners' assertions in their Brief to this

Court, the "harm" regulation is neither narrowly tailored nor carefully applied. Pet. Br. at 16, 45-49.

Petitioners' enforcement of the spotted owl Guidelines illustrates the breadth of the regulation. The Northern Spotted Owl (*strix occidentalis caurina*) was listed as a threatened species on June 26, 1990. *See* Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26,114 (codified at 50 C.F.R. § 17.11). In July 1990, FWS made available the "informal" Guidelines to those who requested them, purportedly to define biologically when a prohibited take would occur from timber harvesting and related activities in and around known spotted owl sites. *See* Guidelines.

The Guidelines established "owl circles" of various sizes centered on an owl nest site or center of activity. Timber harvest and other forest management activities were prohibited in varying degrees within these circles. Specifically, the Guidelines required that the best available 70 acres of suitable habitat (the oldest, largest and most merchantable trees) around the activity center be retained along with the next 500 acres of suitable habitat within 0.7 miles of the activity center, and then 40 percent of the rest of a circle with a radius of 1.2 to 2.2 miles, depending on location. *Id.* at 10. Under the Guidelines, any harvest activity within the suitable habitat within the circle would result in a prohibited take.

The Guidelines were withdrawn in the face of a substantive and procedural challenge under the ESA and the Administrative Procedures Act (the "APA") by Respondents herein. *Sweet Home Chapter of Communities for a Great Or. v. Turner*, No. 91-2218 (D.D.C. 1991). The case was then dismissed as moot because the government represented to the court that the Guidelines unequivocally were rescinded "thereby clearly indicating its intention no longer to apply or enforce them." *Id.* (Memorandum Order at 4 (entered Feb. 27, 1992)). The government's representation to the

court, of course, has proven to be inaccurate, and the size of the circles has since grown to a radius of 2.8 miles, for example, on the Olympic Peninsula in Washington State. *See* Proposed Special Rule for the Conservation of the Northern Spotted Owl on Non-Federal Lands, 60 Fed. Reg. 9,484, 9,492 (Feb. 17, 1995) (to be codified at 50 C.F.R. pt. 17).

FWS's most recent special rule for the northern spotted owl confirms the continued use of owl circles to define "taking" (as well as the absolute absence of any requirement for proof of actual death or injury to owls for the take prohibition to apply to enforcement). FWS states:

> This proposed rule would ease incidental take restrictions on designated non-Federal lands by limiting the incidental take prohibition for timber harvest activities to actions that fail to maintain the 70 acres of suitable owl habitat closest to a site center for a spotted owl. By proposing this action, the Service is not implying that incidental take cannot occur until harvest activities approach and actually invade an owl's activity center. Rather, the Service is proposing that in certain portions of the owl's range, the incidental take of an owl will no longer be a prohibited activity unless it involves harvest activities within an activity center.[10]

Id. at 9,484.

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[10] One might ask what restrictions needed to be eased if FWS had truthfully withdrawn the spotted owl Guidelines as the government represented it had in court.

Moreover, FWS has selected six areas in Washington State for the continued "take" restrictions defined by large owl circles in order "to fill in gaps in protection under the Forest Plan where the Federal land base alone appears currently to be inadequate to provide for the conservation of the owl."[11] *Id.* It is clear from the proposed owl rule that what Petitioners prohibit broadly, and have been prohibiting all along, is timber harvest across the landscape,[12] not specific "harm" to owls.

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[11] Thus, these prohibitions, especially in special emphasis areas of large circles, exist not to prevent take of the owl, but to press nonfederal lands into the public service of "conserving" the owl.

[12] FWS has now attempted to extend the meaning of "harassment" in the definition of "take" to cover habitat modification, apparently to fill the void left by invalidation of the harm regulation. The special rule for the owl states:

> Timber harvest and related activities that disturb the breeding and nesting functions of spotted owls within activity centers during the breeding season can be considered *incidental harassment* of individual spotted owls. More specifically, incidental harassment of spotted owls generally can include harvest activities that occur within the closest 70 acres of suitable habitat surrounding a site center during the owl's reproductive period. . . . Actions with the potential to disturb nesting spotted owls include, but are not limited to, harvest related activities such as felling, bucking, and yarding; road construction; and blasting.

Id. at 9491 (emphasis added).

It is worth noting that FWS originally proposed a definition of "harass" that included "significant environmental modification or degradation" that "actually or potentially harms wildlife by killing or injuring it, or by annoying it to such an extent as to cause serious disruption in essential behavioral patterns such as feeding, breeding or sheltering." 40 Fed. Reg. 28,712, 28,714 (1975). In its final rule, FWS split the pro-

The infamous "bird letter"[13] program in the area occupied by the golden-cheeked warbler around Austin, Texas, further refutes the image painted by Petitioners here of a narrow interpretation. At hearings last year on ESA reauthorization, one witness testified about her experiences trying to obtain a bird letter from FWS in order to build a family home on her property. When she questioned FWS, she testified, "FWS told us it was irrelevant whether the endangered species were actually on our property. Their concern was for the birds that were supposedly nearby." *Id.*

C. The Harm Regulation Fails to Give Fair Warning of the Many Types of Ordinary Land Uses That May Be Treated as Unlawful Habitat Modifications.

Given that criminal prosecutions have occurred and are continuing, that threats of more prosecutions also have been made and that the harm regulation has been applied broadly to many forms of traditional land use activities now deemed unlawful habitat modifications, this Court should be concerned

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posed rule into a new "harm" definition that included the environmental modification provision and a reformulated "harass" definition that did not. 40 Fed. Reg. 44,412, 44,413 (1975). Moreover, FWS retained a higher degree of fault in the rule to establish harassment, requiring an intentional or criminally negligent act that creates the likelihood of injury to wildlife. *Id.* Thus, the special rule speaks volumes about Petitioners' facile interpretation of the Section 9 prohibition on take.

[13] A bird letter, as the witness explained it to the committee, "acknowledges that a property owner's land has been unoccupied (by warblers) for at least three years, or that there is no suitable habitat on the land." *Reauthorization of the Endangered Species Act Focusing on Conservation of Private Lands: Hearings Before the Senate Committee on Environment and Public Works, Subcommittee on Clean Water, Fisheries and Wildlife,* 103d Cong., 2d Sess. (July 19, 1994) (statement of Mary A. Davidson).

that innocent landowners will be ensnared without warning by the reach of the statute and regulation.

Petitioners have given some examples of what the public needs to know to avoid criminal prosecution for habitat modification under the "harm" regulation:

> Identifying habitat modifications that harm individuals of a species involves understanding the species' life history. For example, the Florida jay scrub is highly territorial and relies for its existence on food cached within its territory. A project that destroys occupied habitat and thus the food supply for that family group is likely to result in their starvation. Similarly, a number of birds are highly site-tenacious, returning year after year to the same nesting site. Removal of nesting habitat on that site is likely to result in loss of the pair's reproductive capability, and may result in loss of the pair for lack of available feeding or nesting habitat. Opening up or fragmenting the habitat may similarly affect the species by introducing increased predation or parasitism.

See Draft Endangered Species Consultation Handbook, U.S. Department of Interior, U.S. Fish & Wildlife Service 4-43 (Nov. 1994). To gain such information, Petitioners seem to expect landowners to peruse the Federal Register daily or risk going to jail. *See Adamo Wrecking Co. v. United States*, 434 U.S. 275, 283 n.2 (1978) ("persons subject to the Act, including innumerable small businesses, may protect themselves against arbitrary administrative action only by daily perusal of proposed emission standards in the Federal Register and by immediate initiation of litigation in the District of Columbia to protect their interests").

But even the Federal Register would not be enough here. At the time this case was brought and at present, none of the spotted owl "guidelines" have been promulgated under the APA as final rules in the Federal Register and no standard has been enunciated by the government to give fair notice to private landowners of what conduct would constitute "harm" to most of the 781 species listed. GAO Report at 4 (number of species listed as of May 10, 1993).

Only recently has FWS even admitted the need to make such conduct more clear. *See* 59 Fed. Reg. 34,272 (July 1, 1994) (policy statement "to identify, to the extent known at the time a species is listed, specific activities that will not be considered likely to result in violation of section 9. To the extent possible, activities that will be considered likely to result in violations also will be identified in as specific manner as possible.").

Of the 781 species listed as either threatened or endangered under the ESA, 90 percent, or 712 species, have some or all of their habitat on nonfederal lands. GAO Report at 4. Of the 712 species, 517 species have over 60 percent of their total habitat on nonfederal land, while 264 of the 712 species are entirely dependent on nonfederal lands for their habitat. *Id.* at 5. Each of these species has its own peculiar habitat needs and, in some instances, species that may be found in the same area have conflicting habitat requirements.[14] Innocent

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[14] *See, e.g.*, Proposed Designation of Critical Habitat for the Pacific Coast Population of the Western Snowy Plover, 60 Fed. Reg. 11,768, 11,771-72 (Mar. 2, 1995) ("The [FWS] also excluded from proposed critical habitat sites that would significantly conflict with the survival and recovery objectives of other listed species. Significant conflicts were identified between the habitat needs of snowy plovers and biological objectives for the California clapper rail, light-footed clapper rail and salt marsh harvest mouse. The two rails and mouse are federally listed endangered species." (scientific names omitted)).

persons today are without notice of what land use activities in Petitioners' view might constitute a prohibited take — cutting trees to open the canopy so the gray wolf may thrive[15] or preserving trees for late-successional, closed-canopy species such as the spotted owl.[16]

Petitioners' definition of "harm" gives no warning at all because it fails to provide any intelligible standard in terms that a common citizen of ordinary intelligence will understand. *See, e.g., Ratzlaf v. United States*, 114 S. Ct. at 663 ("fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed."). A primary policy underlying the Rule of Lenity is that "fair warning should be given to the world in language that the common world will understand." *Moskal*, 498 U.S. at 131 (Scalia, J., dissenting).

The regulatory definition of "harm" is so broad that ordinary landowners of "common intelligence must necessarily guess at its meaning and differ as to its application [and it therefore lacks] the first essential of due process of law." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). Whenever Constitutional issues are implicated, the Court should ensure that the statutory term at issue will

> be construed so that [it is] constitutional. . . . By placing upon a criminal statute a narrow construction, we avoid the possibility of imputing to Congress an enactment that lacks necessary precision.

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[15] *See* 59 Fed. Reg. 60,252 (Nov. 22, 1994).

[16] *See* 55 Fed. Reg. 26,114 (June 26, 1990).

Evans v. United States, 112 S. Ct. 1881, 1893 (1992) (Kennedy, J., concurring); *see Custis v. United States*, 114 S. Ct. 1732, 1743 (1994) (Souter, J., dissenting).

The principle behind the Rule of Lenity is that "before a man can be punished as a criminal under the federal law his case must be plainly and unmistakably within the provisions of some statute." *United States v. Gradwell*, 243 U.S. 476, 485 (1917) (internal quotations omitted); *see also United States v. Bass*, 404 U.S. at 347-49. Not only does the landowner not have notice of the conduct proscribed by the harm regulation, but there is no notice of the liability for a violation. *Bell v. United* States, 349 U.S. 81 (1955) (Rule of Lenity should be applied to resolve any doubt as to whether Congress intended a single transaction to be punished as multiple offenses).

When habitat modification is the charged conduct, how are the violations counted? Per incident of habitat modification? Per incident per day? Per number of animals the habitat could have supported? *See, e.g., Rogers v. United States*, 367 F.2d 998 (8th Cir. 1966) (one count per day under the Migratory Bird Treaty Act (the "MBTA")), *cert. denied*, 386 U.S. 943 (1967); *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978) (one count per species per day under the MBTA); *United States v. Equity Corp.*, Cr. 75-51 (D. Utah Dec. 8, 1975); *United States v. Stuarco Oil Co.*, 73-Cr-129 (D. Colo. Aug. 17, 1973) (one count per animal under the MBTA); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 531 (E.D. Cal.) (one count per act resulting in a violation under the MBTA), *aff'd*, 578 F.2d 259 (9th Cir. 1978).

In the end, the government sums up the problem with its own regulation. In their Petition for Certiorari, Petitioners blithely opine that "the cutting of a nest tree in which an endangered species dwells and breeds can effectively kill the bird, regardless of whether the bird is at home when the tree falls." Appellants' Pet. for a Writ of Cert. at 23. This Court

should not miss that in its example, the government requires no knowledge by the landowner of the bird's presence or its behavioral patterns, no scienter in cutting the tree down, no evidence that the bird actually died and, if so, from what cause, no proof that the bird did not move elsewhere and no hint that the landowner should go free of punishment if the bird survived and reproduced.

II. *CHEVRON* DOES NOT GOVERN REVIEW OF STATUTES OF CRIMINAL APPLICATION; CONGRESS DID NOT DELEGATE THE POWER TO DEFINE A CRIMINAL OFFENSE OF HABITAT MODIFICATION TO FWS

As the above sections illustrate, the case for applying the Rule of Lenity is at it is strongest when an ambiguous statute — that is, a law that fails to give warning of the conduct proscribed — is interpreted by an agency such that innocent persons may be put at risk of prosecution for normal day-to-day activities. Lenity gives ties to the defendant; *Chevron* gives deference to the agencies. *Compare United States v. White*, 888 F.2d 490, 497 (7th Cir. 1989) ("The rule of lenity is a tie-breaker when there is an otherwise-unresolved ambiguity") *with Sweet Home*, 17 F.3d at 1473 (Mikva, J., dissenting) (under *Chevron*, "ties go to the dealer"). In the purely civil context where Congress leaves a statutory gap to be filled through reasonable regulation, the *Chevron* approach makes sense because agencies possess expertise in technical areas not enjoyed by courts,[17] but no such expertise exists in defining

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[17] *Chevron* was a citizen's suit petitioning for review of a rule promulgated by an agency to implement a permit program designed by Congress and imposed on the States under the Clean Air Act. *Chevron*, 467 U.S. at 840 (citing 42 U.S.C. §§ 7502(b)(6) & 7607(b)(1)). The statute required states in areas that failed to meet prescribed national ambient air quality standards set by the Environmental Protection Agency ("EPA") to establish permit programs regulating "new or

criminal behavior, the prerogative of the legislature. *See Liparota v. United States*, 471 U.S. at 424.

This Court has not directly considered whether the Rule of Lenity trumps or supplants the *Chevron* approach when ambiguous statutes have criminal application. It is, however, well aware of the issue. In *Regents of Univ. of Cal. v. Public Employment Relations Bd.*, 485 U.S. 589, 602 (1988), this Court applied neither the Rule of Lenity nor the *Chevron* approach when construing the Private Express Statutes, which establish the U.S. Postal Service monopoly and exceptions thereto, because this Court determined that resort to the legislative history revealed Congressional intent.

However, Justice White, while concurring in the result, stated that this Court's rationale should have been consistent with *Chevron*, giving deference to the agency's postal regulations. *Id.* at 603 (White, J., concurring). Justice Stevens, dissenting, would have narrowly construed the statutes, in part because they imposed criminal penalties, and he cautioned that the Rule of Lenity should apply. *Id.* at 604 (Stevens, J., dissenting).

Still, this Court has been consistent in its preference for resolving statutory ambiguity in favor of lenity when criminal penalties potentially are implicated. Yet, lower courts have not been at all consistent. *Compare United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 649 (2d Cir. 1993) (reversing criminal conviction under Clean Water Act on plain language

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modified major stationary sources" of air pollution. *Id.* EPA implementing regulations allowed states to adopt a plant-wide definition of stationary source as opposed to one in which each source of pollution-emitting devices are regulated. The sole issue before this Court in *Chevron* was whether EPA's interpretation was based on a reasonable construction of the statutory term "stationary source." *Id.* No criminal penalties were prescribed by the Clean Air Act or regulation for a state's failure to attain air standards, to implement a program or to adopt the regulation.

grounds, but suggesting *Chevron* would apply had EPA issued regulations), *cert. denied*, 114 S. Ct. 2764 (1994) *with United States v. Borowski*, 977 F.2d 27 (1st Cir. 1992) (applying Rule of Lenity to the Clean Water Act in construing whether defendant's actions violated EPA regulatory standards and, if so, whether they were punishable by criminal sanctions); *see also United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1993) (failing to apply the Rule of Lenity in construing "knowingly" despite the statute's facial ambiguity), *cert. denied*, 1995 U.S. LEXIS 777 (Jan. 23, 1995); *United States v. Wagner*, 29 F.3d 264 (7th Cir. 1994) (considered the Rule of Lenity in construing the meaning of "knowingly" but relying on other decisions that held "knowingly" to mean only general intent); *Conoco, Inc. v. Skinner*, 970 F.2d 1206, 1228 (3d Cir. 1992) (rejecting lenity and applying *Chevron*).

Of course, in the civil context, where *Chevron* normally would apply, "Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." *United States v. Touby*, 500 U.S. 160, 165 (1991). But even in the civil context, this Court has recognized that such delegation is permissible only "[s]o long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Id.* (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)).

Moreover, this Court has suggested, but not decided, that when the delegation involves a statute with criminal application, "something more than a mere 'intelligible principle' is required." *Touby*, 500 U.S. at 165. Before regulations that pose a heightened risk to individual liberty are sustained, courts should require that Congress provide specific guidance as to the conduct it intends to proscribe. *See United States v. Robel*, 389 U.S. 258, 277, 281 (1967) (Brennan, J. concur-

ring) (area of permissible indefiniteness of delegation narrows when the regulation implicates criminal sanctions; such indefiniteness results in inadequate notice to affected persons).

No such guidance is evident on the face of the ESA; indeed, the regulation itself lacks any specificity. Landowners are left to the whim and speculation of government biologists to learn whether they can use their land at all or will face criminal prosecution for past acts of farming or timber harvest, the very concern raised by Respondents herein and the issue resolved now by applying the Rule of Lenity, not *Chevron* deference. *Sweet Home*, 1 F.3d at 4.

CONCLUSION

The judgment of the court of appeals should be upheld.

Respectfully submitted,

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March 24, 1995

APPENDIX A

UNITED STATES v. WANG LIN FARMS CO., INC., and TUANG MING-LIN

CR-F-94-5041 SSH (E.D. Cal., filed Mar. 23, 1994)

INFORMATION

The United States Attorney charges: T H A T

WANG LIN FARMS CO., INC. and TAUNG MING-LIN,

defendants herein, between on or about February 12, 1994, and on or about February 14, 1994, in the County of Kern, State and Eastern District of California, did knowingly take an endangered species of wildlife, to wit: Tipton Kangaroo Rats, by discing habitat essential to the survival of the Tipton Kangaroo Rats, all of which is in violation of Title 16, United States Code, Sections 1538(a)(1)(B) and 1540(b)(1), Title 50, Code of Federal Regulations, Section 17.21(c), and Title 18, United States Code, Section 2.

DATED: March 23, 1994

Respectfully Submitted,

CHARLES J. STEVENS
United States Attorney

By: /S/
KAREN A. KALMANIR
Assistant U.S. Attorney

APPENDIX B

UNITED STATES v. WANG LIN FARMS CO., INC., and TAUNG MING-LIN, aka: Ming Tang Lin

CR-F-94-5041 SSH (E.D. Cal., filed May 24, 1994)

SUPERSEDING INFORMATION

COUNT ONE: [16 U.S.C. §§ 1538(a)(1)(B) and 1540(b)(1) and 18 U.S.C. § 2 – Unlawful Take and Aiding and Abetting the Unlawful Take of an Endangered Species]

The United States Attorney charges: T H A T

WANG LIN FARMS CO., INC. and
TAUNG MING-LIN,
AKA: MING TANG LIN,

defendant herein, between on or about February 12, 1994, and on or about February 14, 1994, in the County of Kern, State and Eastern District of California, did knowingly take and aid and abet the taking of an endangered species of wildlife, to wit: Tipton Kangaroo Rats, by discing habitat of the Tipton Kangaroo Rats, all of which is in violation of Title 16, United States Code, Sections 1538(a)(1)(B) and 1540(b)(1), Title 50, Code of Federal Regulations, Section 17.21(c), and Title 18, United States Code, Section 2.

COUNT TWO: [16 U.S.C. §§ 1538(a)(1)(B) and 1540(b)(1) and 18 U.S.C. § 2 – Unlawful Take and Aiding and Abetting the Unlawful Take of an Endangered Species]

The United States Attorney further charges: T H A T

WANG LIN FARMS CO., INC. and TAUNG MING-LIN, AKA: MING TANG LIN,

defendants herein, between on or about February 12, 1994, and on or about February 14, 1994, in the County of Kern, State and Eastern District of California, did knowingly take and aid and abet the taking of an endangered species of wildlife, to wit: San Joaquin Kit Fox, by discing habitat of the San Joaquin Kit Fox, all of which is in violation of Title 16, United States Code, Sections 1538(a)(1)(B) and 1540(b)(1), Title 50, Code of Federal Regulations, Section 17.21(c), and Title 18, United States Code, Section 2.

COUNT THREE: [16 U.S.C. §§ 1538(a)(1)(B) and 1540(b)(1) and 18 U.S.C. § 2 – Unlawful Take and Aiding and Abetting the Unlawful Take of an Endangered Species]

The United States Attorney further charges: T H A T

WANG LIN FARMS CO., INC. and TAUNG MING-LIN, AKA: MING TANG LIN,

defendant herein, between on or about February 12, 1994, and on or about February 14, 1994, in the County of Kern, State and Eastern District of California, did knowingly take and aid and abet the taking of an endangered species of wildlife, to wit: Blunt-nosed Leopard Lizard, by discing habitat of the Blunt-nosed Leopard Lizard, all of which is in violation of Title 16, United States Code, Sections 1538(a)(1)(B) and 1540(b)(1), Title 50, Code of Federal Regulations, Section 17.21(c), and Title 18, United States Code, Section 2.

DATED: May 19, 1994.

Respectfully Submitted,

CHARLES J. STEVENS
United States Attorney

By: /S/
KAREN A. KALMANIR
Assistant U.S. Attorney

APPENDIX C

UNITED STATES v. WANG LIN COMPANY, INC., aka WANG LIN FARMS CO., INC.,

CR-F-94-5041 SSH (E.D. Cal., filed Jan. 12, 1995)

SECOND SUPERSEDING INFORMATION

COUNT ONE: [16 U.S.C. §§ 1538(a)(1)(B) and 1540(b)(1) and 18 U.S.C. § 2 - Unlawful Take and Aiding and Abetting the Unlawful Take of an Endangered Species]

The United States Attorney charges: T H A T

WANG LIN COMPANY, INC.
AKA: WANG LIN FARMS CO., INC.

defendant herein, between on or about February 12, 1994, and on or about February 14, 1994, in the County of Kern, State and Eastern District of California, did knowingly take and aid and abet the taking of an endangered species of wildlife, to wit: Tipton Kangaroo Rats, by discing habitat of the Tipton Kangaroo Rats, all of which is in violation of Title 16, United States Code, Sections 1538(a)(1)(B) and 1540(b)(1), Title 50, Code of Federal Regulations, Section 17.21(c), and Title 18, United States Code, Section 2.

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defendant herein, between on or about February 12, 1994, and on or about February 14, 1994, in the County of Kern, State and Eastern District of California, did knowingly take and aid and abet the taking of an endangered species of wildlife, to wit: San Joaquin Kit Fox, by discing habitat of the San Joaquin Kit Fox, all of which is in violation of Title 16, United States Code, Sections 1538(a)(1)(B) and 1540(b)(1), Title 50, Code of Federal Regulations, Section 17.21(c), and Title 18, United States Code, Section 2.

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WANG LIN COMPANY, INC.
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defendant herein, between on or about February 12, 1994, and on or about February 14, 1994, in the County of Kern, State and Eastern District of California, did knowingly take and aid and abet the taking of an endangered species of wildlife, to wit: Blunt-nosed Leopard Lizard, by discing habitat of the Blunt-nosed Leopard Lizard, all of which is in violation of Title 16, United States Code, Sections 1538(a)(1)(B) and 1540(b)(1), Title 50, Code of Federal Regulations, Section 17.21(c), and Title 18, United States Code, Section 2.

DATED: January 12, 1995

Respectfully Submitted,

CHARLES J. STEVENS
United States Attorney

By: / S /
KAREN A. KALMANIR
Assistant U.S. Attorney

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INTEREST OF AMICI CURIAE

The National Association of Home Builders ("NAHB") is a not-for-profit corporation organized under the Not-for-Profit Corporation Law of the State of Illinois. NAHB represents over 183,000 builder and associate members organized in approximately 850 affiliated state and local associations located in all fifty states, the District of Columbia, and Puerto Rico. NAHB's members include not only individuals and firms that construct and supply single family homes, but also apartment, condominium, commercial, and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.

The International Council of Shopping Centers, Inc. ("ICSC") is a not-for-profit corporation organized under the Not-For-Profit Corporation Law of the State of Illinois. ICSC is the trade association for the shopping center industry. It has over 27,000 members worldwide of which 25,000 are based in the United States. ICSC's members include developers, retailers, lenders, owners, managers and all others having a professional interest in the shopping center industry. Its members own and manage virtually all of the 40,000 shopping centers in the United States. In 1993, these centers accounted for $830.2 billion in retail sales, representing 55 percent of all non-automotive retail sales and employed over 10 million people, 9 percent of the total non-agricultural employment in the United States.

Members of NAHB and ICSC are directly impacted by the prohibition against "take" of endangered species contained in Section 9 of the Endangered Species Act (the "Act") [16 U.S.C. § 1538(a)(1)]. The expansion of the definition of "take" in Section 3 of the Act [16 U.S.C. § 1532(19)] by 50 C.F.R. 17.3 to include harm resulting from habitat modification

has materially affected the development of land and construction of residential, commercial, industrial and retail buildings. The costs and delays associated with obtaining permits to "take" the habitat of protected species pursuant to Section 7 (16 U.S.C. § 1536) or Section 10 (16 U.S.C. § 1539) of the Act fall primarily on the landowners, developers, and builders that comprise the membership of NAHB and ICSC. These costs are ultimately passed on to consumers in the form of higher rents and retail prices and increased home prices.

STATEMENT OF THE CASE

Amici adopt the statement of the case contained in the brief for Respondents.

SUMMARY OF ARGUMENT

The Secretary's expansion of the definition of "harm" in 50 C.F.R. 17.3 is not necessary to accomplish the enunciated goal of the Act of preserving the ecosystems upon which endangered and threatened species depend. Congress has authorized a comprehensive program including a number of regulatory mechanisms, which taken together provide protection to the critical habitat of protected species. If Congress had intended to prevent adverse modification of critical habitat through the Section 9 take prohibition, it would not have authorized other mechanisms specifically directed toward the protection of critical habitat.

The failure of the Secretary of the Interior ("Secretary") to designate critical habitat, which is the linchpin of the regulatory process, has led to excessive and unwarranted reliance on the Section 9 take prohibition. Failure to designate critical habitat undermines the effectiveness of other regulatory mechanisms, especially the development of recovery plans for

protected species, and creates major and unnecessary burdens on landowners seeking incidental take permits pursuant to Section 7 and Section 10 of the Act.

The 1982 amendment to Section 10(a) of the Act did not expand the definition of harm or the scope of the Section 9 take prohibition. The Section 7 Federal agency consultation process is designed to ensure that any proposed adverse modification of critical habitat will not jeopardize the survival of the protected species. The Section 10 permit process, which applies when there is no Federal agency involvement, embodies the same jeopardy standard. The Act expressly regulates the adverse modification of habitat through Section 7 jeopardy determinations only. There is no basis for extending protections against habitat modification to situations not subject to Section 7 or Section 10.

The Secretary's expansive definition of harm has placed significant burdens on private landowners. In practice, the artful distinctions within the definition of harm are ignored and habitat modification is equated with take. The misapplication of the prohibitions, coupled with the failure of the Secretary to designate critical habitat, distorts the Section 10 habitat planning process and creates disincentives for landowners to participate in the process.

ARGUMENT

1. CONGRESS HAS PROVIDED A COMPREHENSIVE, INTEGRATED, AND SEQUENTIAL REGULATORY PROCESS TO PROTECT THE CRITICAL HABITAT OF ENDANGERED AND THREATENED SPECIES WHICH MAKES THE SECRETARY'S EXPANSION OF THE DEFINITION OF HARM UNNECESSARY.

One of the goals of the Act is the protection of the habitat, and Congress has provided a comprehensive regulatory program for accomplishing that goal. The Secretary has failed to designate critical habitat [1/] and to develop recovery plans for most protected species. Due to such failure, the Fish and Wildlife Service has come to rely primarily on the listing process and the prohibition against take to achieve the Act's overall goals. In practice, the take prohibition is being invoked by the Secretary to accomplish the specific regulatory tasks that Congress intended the critical habitat and recovery plan procedures of the Act to achieve.

1/ As of 1991, the Secretary had only designated critical habitat for 16 percent of all listed species. Endangered Species Act, Types and Numbers of Implementing Actions, Briefing Report to the Chairman, Committee On Science, Space and Technology, House of Representations, at 29 (General Accounting Office, May, 1982).

A. Congress Has Provided The Secretary With a Number of Regulatory Mechanisms to Provide for the Long-Term Protection of Habitat.

As articulated by Congress, the purposes of the Act is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species" [16 U.S.C. § 1531(b)]. The definition of "conservation," 16 U.S.C. § 1532(3) and the phrase "to provide a program," evidence Congressional intent to use a range of tools, rather than the Section 9 taking prohibition, to accomplish the goals of the Act. Conservation is defined to include "all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, line trapping, and transplantation."

The regulatory mechanisms which Congress contemplated would be included in the program are the listing procedure, the Section 9 prohibition against "take," the designation of critical habitat under Section 4(a), the issuance of special management rules under Section 4(d), the promulgation of recovery plans pursuant to Section 4(f), the Section 7 and Section 10 incidental take permit processes, and the direct acquisition of habitat land authorized by Section 5. The prohibition against take in Section 9, by itself, neither prohibits habitat modification nor constitutes a program for habitat protection, but is only the first step in a lengthy and comprehensive regulatory process. The regulatory process is designed to proceed in a logical sequence beginning with the listing of a species as endangered or threatened, followed by the designation of one or more areas as critical habitat, and culminating in the issuance of a recovery plan. Only when all

of these measures are implemented can protection of species and their habitats be achieved.

Congress also directed the Secretary to prepare recovery plans for the conservation and survival of protected species. 16 U.S.C. § 1533(f). Each plan is required to incorporate (1) "a description of such site specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species," 16 U.S.C. § 1533(f)(1)(B)(i), (2) "objective, measurable criteria which when met, would result in a determination . . . that the species be removed from the list," 16 U.S.C. § 1533(f)(1)(B)(ii), and (3) "estimates of time required and the cost to carry out those measures needed to address the plan's goal," 16 U.S.C. § 1533(f)(1)(B)(iii).

The Secretary has discretion not to prepare a recovery plan if the Secretary finds that such a plan will not promote the conservation of the species, 16 U.S.C. § 1533(f)(1). Due to inadequate resources, the Secretary has completed few critical habitat designations. As a result, the level of scientific information required to develop effective recovery plans is generally not available.

Congress has also provided for two types of permits which authorize the incidental take of a protected species. Section 7 provides for consultation between the Fish and Wildlife Service and any Federal agency which proposes to authorize, fund or carry out an activity which could result in jeopardy to a protected species. Section 10 provides a process for private landowners to obtain take permits when there is no Federal agency involvement in an otherwise lawful activity. Under both of these permit procedures, adverse modification of critical habitat is allowed unless the Secretary makes a formal

determination that the survival of the protected species is in jeopardy.

B. The Failure of the Secretary To Designate Critical Habitat Has Led To Unjustified Reliance on the Section 9 Take Prohibition.

The designation of critical habitat is the linchpin to the regulatory process. Critical habitat is defined in 16 U.S.C. § 1532(5)(A)(i) to include specific areas occupied by the species "on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." The characteristics of critical habitat "include (1) space for individual and population growth, (2) nutritional or physiological requirements, (3) cover or shelter, (4) sites for breeding, reproduction, rearing of offspring, germination or seed dispersal, or (5) habitats that are protected from disturbance or are representative of the historic geographical and ecological distribution of a species." 50 C.F.R. 424.12. Congress has created specific mechanisms for designating critical habitat, including provisions for separate rulemakings and standards for the sufficiency of scientific information. Petitions to designate critical habitat are (as well as listing petitions) governed by 5 U.S.C. § 553(e) and 16 U.S.C. § 1533. The Secretary is required to designate "any habitat of such species which is then considered to be critical habitat" concurrently with any listing of the species as endangered or threatened. 16 U.S.C. § 1533(a)(3).

Congress distinguished between the narrower concept of modification of critical habitat and modification of historic habitat. Critical habitat may also include areas outside the geographical area occupied by the species at the time it is listed as endangered or threatened "upon a determination by

the Secretary that such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The Act creates a presumption that critical habitat shall not include the entire geographical area which can be occupied by the protected species "except in circumstances determined by the Secretary." 16 U.S.C. § 1532(5)(C). These express grants of discretion to the Secretary make it clear that adverse modification of critical habitat cannot be equated with adverse modification of historic habitat. The Secretary must determine whether a proposed modification of critical habitat will put the protected species in jeopardy pursuant to the consultation process provided in Section 7 of the Act.

At the time of listing of an endangered species, the Secretary has the discretion to exclude any area from critical habitat if "he determines that the benefits of such exclusion outweigh the benefits of specifying such area as critical habitat." 16 U.S.C. § 1533(b)(2). Pursuant to 50 C.F.R. 424.12, there are two distinct grounds for not making a determination of critical habitat at the time of listing: (1) that such a designation would not be prudent or (2) critical habitat cannot be determined: This grant of discretion to the Secretary to avoid the obligation to designate critical habitat in these kind of special circumstances is consistent with the definition of harm enunciated by the Court of Appeals, i.e., the direct application of force against individual members of a protected species.

The regulations state that a designation of critical habitat by the Secretary is not prudent where the "species is threatened by taking or other business activity, and identification of critical habitat can be expected to increase the degree of such threat to the species," 50 C.F.R. 424.12(a)(1)(i) or "such designation of critical habitat would not be beneficial to the species," 50 C.F.R. 424.12(a)(1)(ii). The "prudent" standard is designed to prevent human predation in the form of

the direct application of force, which the Court of Appeals determined to constitute "harm" within the definition of take contained in 16 U.S.C. § 1532(19). Designating the last known habitat areas of a species could accelerate the depletion of a protected species by either attracting trophy hunters in the case of game species or encouraging excessive collection of non-game species for scientific purposes.

Furthermore, the Secretary is not obligated to designate critical habitat when the location or extent of such habitat is not determinable. Critical habitat cannot be determined when "information sufficient to perform required analysis of the impacts of the designation is lacking" 50 C.F.R. 424.12(a)(2)(i) or "the biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat," 50 C.F.R. 424.12(a)(2)(ii).

The Act also makes a distinction between the amount of scientific information necessary to support listing a species as endangered or threatened, on the one hand, and the designation of critical habitat, on the other. Evidence may be sufficient to support a finding that a species is endangered or threatened pursuant to Section 4(a), although such evidence would be inadequate to support a determination of critical habitat pursuant to Section 4(b).

The express recognition of separate petition processes for listings and critical habitat designations, the independent discretion retained by the Secretary regarding critical habitat designations and the different levels of scientific information required to support listings and critical habitat designations, demonstrate that Congress has clearly distinguished between the listing process which triggers the take prohibition of Section 9 and the designation of critical habitat. If Congress intended the meaning of harm within the definition

of take in Section 9 to have included the "adverse modification of habitat where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering," then there would not have been any need to establish a separate process and higher standards of scientific evidence for designating critical habitat which encompass the same criteria.

C. The Secretary's Claim That Protection of The Habitat for Endangered Species Is To Be Accomplished Through The Take Prohibition Is Without Merit.

The claim by the Secretary that the ambitious goal of protecting the habitat of endangered and threatened species is to be accomplished through the take prohibition of Section 9 is without merit. The intent of Congress is to limit the take prohibition to "cease and desist" situations, where individuals of a protected species are at risk of imminent death from the direct application of physical force. As correctly stated by the Court of Appeals below, "Congress clearly did not have so massive an expansion of government power on so slight a nail as § 9's provision that no one should "harass, harm, pursue, pressure, hunt, shoot, wound, kill, trap, capture or collect an endangered species." Sweet Home Chapter of Communities For a Greater Oregon, 30 F.3d 190 (D.C. Cir. 1994), 193.

The Court of Appeals properly recognized that the Secretary has additional conservation responsibilities under the Act and cannot rely on private property owners subject to the Section 9 take prohibition to accomplish the larger goals of the Act. "Extending the word harm to reach habitat modification as so conceived carries Section 9's prohibition far beyond the reach effected by all the other terms used in the definition; it applies to every citizen duties the Act expressly

imposed only on federal government agencies." Sweet Home Chapter of Communities for a Greater Oregon v. Babbitt, 30 F.3d 190 (D.C. Cir. 1994), 193.

2. THE EXISTENCE OF A PERMIT PROCESS DOES NOT EXPAND THE SCOPE OF THE HARM DEFINITION TO INCLUDE MODIFICATION OF HABITAT.

Congress provided relief from the prohibition against take by adoption of Sections 7 and 10 of the Act. Permits under these sections of the Act may be issued only when the proposed take of the protected species is incidental to an otherwise lawful activity. A permit cannot be issued for an intentional taking such as one involving the direct application of force to harm an individual of a protected species.[2/] Prior to approving any permit, the Secretary is required to issue a biological opinion and to make a determination that the proposed action will not lead to the adverse modification of critical habitat that would jeopardize the survival of the species.

2/ See Preliminary Draft Handbook for Habitat Conservation Planning and Incidental Take Permit Processing, Fish and Wildlife Service, U.S. Department of the Interior, September 15, 1994, p. 80:

> "All taking of a federally listed fish and wildlife species as detailed in the conservation plan, must be incidental to otherwise lawful activities and not the purpose of such activities. For example, deliberate shooting or wounding (of) a listed species would not be considered incidental take and under no circumstances would qualify for an incidental take permit."

A. The Section 7 Consultation Process Requires That Federal Agencies Adopt Measures to Minimize Adverse Modification Only Where Habitat Has Been Designated As Critical.

Section 7 of the Act requires any Federal agency contemplating an action that could impact a protected species or its critical habitat to consult with the Secretary to minimize any adverse impacts. The Section 7 consultation process applies to any action authorized, funded or carried out by a Federal agency.

The agency and the Secretary together have an obligation to insure that the proposed action "is not likely to jeopardize the continual existence of any endangered species or result in the destruction or adverse modification of habitat of such species or result in the destruction or adverse modification of habitat of such species, which is determined by the Secretary . . . to be critical" (emphasis added), 16 U.S.C. § 1536(a)(2). Section 7 of the Act contains other references to a "jeopardy" standard applicable to adverse modification of critical habitat, including a provision setting forth the contents of the Secretary's written jeopardy determination, 16 U.S.C. § 1536(b)(3). In those situations where jeopardy in the form of adverse modification of critical habitat is found, the Secretary is required to "suggest those reasonable and prudent alternatives which . . . can be taken by the Federal agency or applicant in implementing the agency action," 16 U.S.C. § 1536(b)(3)(A).

Based upon the language of the statute, Congress assumed that critical habitat would be designated, that the designation would be based upon the best scientific and commercial data available, and that the Secretary would have this information available when preparing jeopardy determinations and issuing biological opinions pursuant to

Section 7 of the Act. Excessive reliance by the Secretary on the definition of harm as including adverse modification of habitat, as applied to private landowners through the Section 9 take prohibition, creates significant problems in the context of a Section 7 consultation. If the Secretary has not fulfilled his duty to designate critical habitat, the costs and delays associated with developing adequate information on the location and distribution of the potential species and the extent and quality of its remaining habitat falls on the private landowner seeking approval for a project.

B. Section 10 Embodies the Same Jeopardy Standard as Section 7 and Does Not Expand the Definition of Harm.

The 1982 amendments to the Act expanded Section 10 and created a new form of permit authorizing an incidental take to be utilized when the Section 7 consultation process is not available. A permit applicant under Section 10 must submit a conservation plan, commonly referred to as a habitat conservation plan ("HCP") which specifies (1) the likely impact of the proposed taking of a protected species, (2) steps the applicant will take to minimize and mitigate such impacts and the funding available to implement such steps, (3) a discussion of alternative actions considered and the reasons for rejecting those alternatives, and (4) any other measures the Secretary may require as being necessary and appropriate. 16 U.S.C. § 1539(a)(2)(A).

In order to approve an incidental take permit, the Secretary must make a determination that (1) the proposed taking is incidental to an otherwise lawful activity, (2) that the applicant will minimize and mitigate the impacts of such a taking to the maximum extent practicable, (3) that adequate funding exists to implement the plan, (4) that any additional

measures required by the Secretary will be enforceable, and (5) that "the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild." 16 U.S.C. § 1539(a)(2)(B).

The "not appreciably reduced standard" is the same jeopardy standard contained in Section 7(a)(2), "not likely to jeopardize the continued existence." The equivalency of these standards is supported by legislative history, interpretations of the meaning of applicable law by the Secretary, and expert commentators. The legislative history makes the linkage between the two provisions explicit.[3/] Even the Secretary has acknowledged that the jeopardy provisions of Section 10 and Section 7 are equivalent.[4/] The central

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3/ "The Secretary will base his determination as to whether or not to grant the permit, in part, by using the same standard as found in Section 7(a)(2) of the Act, as defined by Interior Department regulations, that is, whether the taking will appreciably reduce the likelihood of the survival and recovery of the species in the wild." H.R. Conf. Rep. No. 835, 97th Cong. 2d Sess. 29, reprinted in 1982 U.S. Code Cong. & Admin. News 2807, 2870.

4/ This is a critically important criterion under Section 10(a)(1)(B) of the ESA because it involves the efforts of the project on the survival of the listed species. Furthermore, its wording is the same as the "jeopardy" definition under Section 7 regulations (50 C.F.R. Part 402.02), which defines the phrase "jeopardize the continued existence" to mean "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers or distribution of that

importance of the jeopardy standard has also been noted by an expert commentator.[5/]

The Secretary must prepare a biological opinion and jeopardy determination for each HCP application, which is the functional equivalent of the jeopardy determination required under Section 7.

C. Designation of Critical Habitat Is a Prerequisite to an Effective Habitat Conservation Plan.

Congress recognized that the identification of critical habitat is a key component of any HCP. The 1982 amendments to Section 10(a) expressly approved the San Bruno Mountain HCP for a portion of San Mateo County, California. House Conf. Rep. No. 835, 97th Cong. 2d Sess. 32, reprinted in 1982

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species." Preliminary Draft Handbook For Habitat Conservation Planning and Incidental Take Permit Processing, Fish and Wildlife Service, U.S. Department of the Interior, September 15, 1994, 81-82.

5/ The legislature history of Section 10(a) suggests that the "not appreciably reduce the likelihood of the survival of the species in the wild" standard incorporation in Section 10(a)(2)(B)(iv) is the most substantive requirement in the Section 10(a) incidental taking permit process. While the USFWS and NMFS have considerable freedom in deciding when and how to issue incidental take permits, they cannot issue permits that will violate that standard. F. Cheever, An Introduction To The Prohibition Against Takings In Section 9 Of The Endangered Species Act Of 1973: Learning To Live With A Powerful Species Preservation Law, 62 Univ. of Colorado L.R. 109, 170 (1991).

U.S. Code Cong. & Admin. News 2807, 2873 notes with approval that: "Prior to developing the conservation plan, the County of San Mateo conducted an independent exhaustive biological study which determined the location of the butterflies, and the location of their food plants. The biological study also developed substantial information regarding the habit and life cycles of the butterflies and other species of concern." This level of biological information, which formed the basis for the San Bruno Mountain HCP, fits the definition of critical habitat in 16 U.S.C. § 1532(5)(A)(i): "the specific areas within the geographic area occupied by the species . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which require special management considerations or protections."

When the Secretary approved the San Bruno Mountain HCP and issued the Section 10(a) incidental take permit, a group opposed to the proposed development challenged the approval. Friends of Endangered Species v. Jantzen, 760 F.2d 976 (Ninth Circuit, 1989). The Court of Appeals noted that a complete biological report had been prepared and that 86 percent of the habitat of the Mission Blue butterfly, one of the endangered species covered by the San Bruno Mountain HCP, was permanently protected. Under these circumstances, the Court of Appeals found that the Secretary's decision to allow a taking in the form of adverse modification of the other 14 percent of the Mission Blue's habitat did not appreciably reduce the likelihood of the survival of the species.

Protection of critical habitat in instances where the Section 7 consultation process is not available occurs through the issuance of a HCP. As noted in Endangered Species Act, Information on Species Protection on Nonfederal Lands, Report To The Chairman, Committee on Merchant Marine and

Fisheries, House of Representatives (General Accounting Office, 1994), "Critical habitat designated on nonfederal lands receives protection under ESA only when an activity affecting that habitat is included in a consultation under § 7." When a HCP application is subjected to a Section 7 consultation as part of the Secretary's review process, the distinction between protection of critical habitat on federal and non-federal lands disappears. If critical habitat is protected only in the context of a Section 7 or Section 10 permit process, it is difficult to understand how noncritical habitat is entitled to protection outside Section 7 and Section 10. If Congress intended Section 9 to protect the adverse modification of habitat, it would not have created the Section 7 and Section 10 regulatory mechanisms.

Given this interplay between the provisions of Section 7 and Section 10 and the resulting focus on protecting critical habitat, the Secretary's equating of habitat modification with harm is not justified because Congress has provided specific mechanisms for protecting critical habitat for all types of actions, whether or not they involve a Federal action. The Secretary does not need to resort to an overbroad definition of harm and the application of the take prohibition of Section 9 to accomplish the goal of preserving the ecosystems on which protected species depend.

3. APPLICATION OF THE SECRETARY'S REGULATORY DEFINITION OF HARM CREATES MAJOR BURDENS FOR PRIVATE LANDOWNERS AND DISCOURAGES THE BROADER USE OF THE SECTION 10 HCP PROCESS.

The Section 10 process is often championed as a flexible and creative mechanism for private landowners to resolve disputes arising under the Act. In practice, however, it suffers from the same problems as the Section 7 consultation process when the Secretary has not designated critical habitat or developed plans for recovery of the protected species. As the Act is currently administered, private landowners seeking a Section 10(a) permit must complete all of the regulatory steps assigned to the Secretary, including delineation of critical habitat and development of a long-term plan to preserve the species which is adequately funded and legally enforceable.

In the context of the HCP planning process, the failure of the Secretary to designate critical habitat creates a situation where any habitat modification could be deemed to constitute harm to the species and trigger the Section 9 take prohibition. Petitioners claim that the words in 50 C.F.R. 17.3 effectively limit the type of habitat modification which constitutes harm to situations "where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." However, this language offers little protection to private landowners because the Field Offices of the Fish and Wildlife Service that implement the Act do not draw such a distinction. Habitat modification is equated with take and the landowners have the burden of proving that their proposed actions will not harm the species. Landowners are asked to survey their own properties, submit the data to the Fish and Wildlife Service, and forgo the

economic use of their properties until the Section 10(a) permit is issued.

Because the Secretary retains some discretion to not designate critical habitat at the time a species is listed as endangered or threatened, the government may avoid potential Fifth Amendment claims by not designating critical habitat. Critical habitat must be defined by specific limits using reference points and lines as found on standard topographic maps of the area. 50 C.F.R. § 424.12(c). Such delineations put landowners on notice that they may have potential eminent domain claims for taking of their property without compensation. Failure to designate critical habitat, coupled with the Secretary's existing interpretation of harm to include habitat modification, leaves landowners in a regulatory twilight zone, with no means to exhaust administrative remedies or any effective method to demonstrate the futility of pursuing such remedies, which are preconditions to bringing a Fifth Amendment claim. As previously noted, the Secretary had only designated critical habitat for 16 percent of all listed species as of 1991.

The Stephens Kangaroo Rat ("SKR") controversy provides excellent examples of the disincentives created by the current misadministration of the Act. The SKR is found primarily in grassland habitats located in Riverside County, California. It was listed as an endangered species on September 30, 1988, 53 Fed. Reg. 38469. The County Board of Supervisors (the "Board"), in cooperation with affected landowners, established a program to ensure compliance with the Act by preparing a Short-term HCP. On November 15, 1988, the Board adopted an ordinance establishing a series of SKR Study Areas. Riverside County's designation of the Study Areas, which were presumed to be SKR habitat, was presumed erroneously to be Section 9 take.

The Board subsequently established a mitigation fee of $1,950.00 per acre which was assessed on all development projects within a major portion of the SKR's historic range. The purpose of the fee was to pay for the development and the acquisition and management of habitat preserves. The mitigation fee was imposed without regard to whether the land actually contained SKR habitat, or whether such development would result in loss or degradation of any such habitat. The Fish and Wildlife Service issued a Section 10(a) permit for the Short-term HCP on August 1, 1990.

On at least one known occasion, the Fish and Wildlife Service has advised a developer that a landowner is presumed to be guilty of violating the Act until proven innocent. In January, 1989, Friedman Homes was grading the site of a 462 lot single family subdivision near Lake Elsinore when an employee of the Fish and Wildlife Service appeared and threatened the project manager, Bob Deihl, with arrest and fines if the grading operations did not cease immediately. Deihl was sufficiently convinced of the seriousness of the situation that he authorized the grading to be stopped and returned to his employer's corporate office.

A month later, the Fish and Wildlife Service provided Friedman Homes with a list of five approved biologists and requested that a report be prepared containing any evidence that the SKR was <u>not</u> present on site. In March, 1989, Friedman Homes hired Tierra Madre, a local biological consulting firm on the approved list. During April and May, Tierra Madre conducted three nights of trapping and identification (SKRs are nocturnal). No SKRs were found. The report was filed with the Fish and Wildlife Service at the end of May.

Grading resumed approximately three weeks later. In July, 1989, employees of the Fish and Wildlife Service reappeared at the job site and stated that they disagreed with the report prepared by their recommended biologist. They were confident that SKRs must be present somewhere on the site. They also demanded to know why the developer had waited less than three weeks from the time the biological report was submitted before resuming grading. The developer received a verbal warning that the statute of limitations under the Act was five years and that he could be arrested at any time before the period expired. The statute of limitations has run without any arrests.

Nevertheless, the Fish and Wildlife Service's actions had a number of direct economic impact on the project. The contract price for the grading work was $4,100,000. Because the site was shut down, the grading contractor had to seek replacement work. During the month of work stoppage, the contractor's crew of 30 employees was unemployed. Friedman Homes was financing its development work with a $5,500,000 loan secured by the property. The interest cost of carrying the indebtedness for an additional five months was approximately $250,000. The biological consultants cost approximately $5,000. The SKR mitigation fee was also imposed on each lot. As a result of these costs, $800 was added to the purchase price of each home and over a 30 year term would cost homebuyers $2,720 per unit. Multiplied by 462 lots, the additional cost arising out of the misapplication of the Act could reach $1,256,640.

We respectfully urge the Court not to conclude from the lack of reported appellate cases that the misadministration of the Act by the Secretary has not violated property rights. Illustrative of the infringements to property rights is the experience of the Lusk Company, a landowner and developer

of an area known as Menifee Village in Riverside County, California. Lusk entered into a Development Agreement with the County on November 8, 1988, pursuant to California law, which vested certain development rights, prior to the designation of the study areas and imposition of the fees by the Board. In 1991, Lusk sought grading permits and was informed that the company must pay $2,350,042.50 in mitigation fees upon issuance of the grading permits. In order to obtain the necessary permits, Lusk paid the fees under protest, as provided by California law, and filed suit against the County on July 22, 1991, in Superior Court for the County of Riverside.

The suit sought the refund of fees paid with interest, damages, and attorneys' fees. The complaint alleged that there was no reasonable relationship between the fees charged for the particular type of development and the costs of preparing and implementing a HCP because agricultural developers paid different fees than those paid by residential developers. Lusk also argued that at least partial mitigation of any impacts on SKR habitat had already been addressed in the Development Agreement which obligated the company to pay $260 per residential unit into an open space land bank established to provide, inter alia, for habitat conservation.

Much of Lusk's property was either unoccupied habitat or unsuitable habitat. In the absence of a critical habitat designation and a jeopardy determination, there was no justification for characterizing the modification of these non-habitat areas as take requiring mitigation. Although the matter was settled before trial and Lusk received a partial refund of its SKR mitigation, Lusk's experience proves that the misadministration of the Act encourages unnecessary litigation and delays development in an industry which is time sensitive.

The problems resulting from the application of a broad definition of harm to include habitat modification, when actual habitat has not been designated for a species, become more severe when a property contains a substantial amount of occupied habitat. Tom and Janice Morger own 949.66 acres of land in Riverside County, which they purchased in portions between 1984 and 1990 with profits from their wig-making business. They intended to retire to the property and establish a citrus orchard. They moved two homes to the property. When they attempted to obtain permits to attach their homes to permanent foundations, they were informed by the County that the property was within a SKR Study Area and that a complete prohibition against take applied.

Realizing that they did not have the financial means to challenge the County, and fearing prosecution for an unauthorized take of a protected species, the Morgers entered into an option agreement with the Baldwin Company, a developer and homebuilder, on November 27, 1989, with a purchase price of $18,690,000 or $19,681 per acre, due upon exercise of the option. The Baldwin Company initiated the preparation of a Specific Plan for the property which proposed development of a mixture of residential, commercial and open space uses including an estimated 2,400 dwelling units.

The Baldwin Company contracted for a biological study. The survey divided the property into low, medium and high habitat values. The petition for removal proposed that all low value habitat and part of the medium value habitat be removed in exchange for the dedication of the high value habitat. The survey also determined that 100 acres of the property was occupied SKR habitat. The Morgers then filed a request with the Riverside County Habitat Conservation Agency, a joint powers agency established to implement the

Short-term HCP, to remove their property from the Study Area.

In 1990, the County initiated an abatement action, demanding that they demolish the two homes which had fallen into disrepair. When the Morgers responded that the County would not allow the construction of a road to the homes without the approval of the Fish and Wildlife Service and the Habitat Conservation Agency, the County dropped the suit. In July, 1991, the Baldwin Company ceased its efforts to process the Specific Plan and the option expired.

The Morgers filed an individual Section 10(a) permit application in 1993, but the Secretary has taken no action. In November, 1994, the Habitat Conservation Agency denied the Morger's request to be removed from the Study Area. They had expended more than $70,000 in legal fees on the relief application. Having exhausted all other remedies exhausted, the Morgers filed suit against the Habitat Conservation Agency and Riverside County on November 14, 1994, in Superior Court for the County of Riverside, seeking damages for inverse condemnation and declaratory relief. Even though only a small portion of their approximately 950-acre parcel is occupied habitat, the Morgers have effectively been denied all use of their property for over six years.

One final example illuminates the negative impact of the current regulatory definition of harm and the inequitable result of the Secretary's failure to designate critical habitat. Mike Rowe purchased 20 acres in Riverside County in the 1980's with the intention of building a home for his wife and three children. The Rowes moved into the existing one-bedroom home on the property where they intended to live temporarily until their new home was constructed. In 1991, Mr. Rowe applied for a building permit and was informed by the County that his property was located in a SKR Study Area.

The new home was to be built immediately adjacent to the existing one, in an area where the soil was compacted from years of use and was therefore not suitable for SKR habitat. In order to obtain a permit Mr. Rowe was required to obtain a biological survey.

Mr. Rowe has not performed a biological survey. He believes strongly that the collection of such data is the responsibility of the Fish and Wildlife Service. He has seen crows and raptors feeding on SKRs on his property. An expensive survey will only confirm the fact that SKRs are present. Rowe believes that because SKRs are present, he, like the Morgers, will be unable to get his property removed from the Study Area, even though he wants to build on a small portion of the total property which is not occupied by SKRs. The application for the Final SKR HCP has been submitted by the County to the Fish and Wildlife Service. He is unable to evaluate his legal options until the final HCP is approved and the SKR preserve areas are finalized.

These are real world problems that result from the use of the expansive definition of harm in 50 C.F.R. 17.3. While the Secretary claims that habitat modification is prohibited only when "it actually kills or injures wildlife by significantly impairing essential behavioral patterns," the Fish and Wildlife Service continues to exercise its veto over actions by local governments such as the County of Riverside and its Habitat Conservation Agency to provide relief to property owners with the habitat of protected species on their property by treating any habitat modification within a Study Area as take. The Fish and Wildlife Service is effectively placing the entire burden of determining critical habitat and planning for the recovery of the SKR on private landowners.

In good economic times, companies like Freidman Homes, Lusk and the Baldwin Company have the choice of challenging demands for excessive mitigations or passing the costs of compliance along to consumers. In less rosy economic times, neither option is available. Property owners, such as the Morgers and the Rowes, have few choices under any circumstances because they do not have the resources to vindicate their property rights.

4. CONCLUSION

This case was correctly decided by the Court of Appeals. Limiting the definition of harm to the direct application of physical force to individual members of a protected species is consistent with Congressional intent and the overall structure of the Act. If the decision below is upheld, the Secretary will retain significant authority to safeguard a protected species by designating critical habitat and minimizing or mitigating impacts on critical habitat through the Section 7 consultation process and the Section 10(a) incidental take permit process. Private landowners should not be forced to bear the considerable burdens imposed by the Act when these burdens were expressly assigned by Congress to the Secretary.

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1994

BRUCE BABBITT, Secretary of the United States Department of the Interior, *et al.*,

Petitioners,

vs.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF AS AMICUS CURIAE OF THE NATIONAL CATTLEMEN'S ASSOCIATION AND THE CATL FUND IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

The National Cattlemen's Association ("NCA") is the national spokesperson and issues manager for all segments of the U.S. beef cattle industry. The NCA represents more than 230,000 professional cattle breeders, producers and feeders, as well as 75 affiliated state and national associations. It is the only national grassroots organization that articulates policies on behalf of the single largest holders of private property in America -- the beef cattle industry. Through the NCA, cattlemen work to create positive business conditions and to maintain the land from which they make their living while providing consumers with the finest beef in the world. The CATL Fund was created to assist landowners and others similarly situated, including cattlemen, in establishing broad based legal precedent to protect property rights, promote free enterprise and minimize regulatory abuses. Together, amici seek to assist the Court in understanding how the regulation in question operates in practice to prevent this nation's ranchers from engaging in everyday agricultural activities, depriving them of the use of their lands and their collective ability to earn a living.

SUMMARY OF ARGUMENT

1. Ranchers use land to produce livestock and to make their living. Ranchers must carefully manage their land to permit its continuing use and individual ranchers must use large tracts of land to raise livestock. Because ranchers have not developed their property in the same way others have, ranch property contains a disproportionate amount of habitat that might be suitable for species listed as endangered, pursuant to the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* ("ESA").

a. The right to use land is entitled to substantial protection under the United States Constitution, and regulations which forbid the profitable use of private property require the property owner be compensated pursuant to the Fifth Amendment. *Lucas v. South Carolina Coastal Council,* 112 S. Ct. 2886 (1992).

b. The ESA itself provides for compensation to acquire property in furtherance of the goals of that Act. 16 U.S.C. § 1534(a)(2). Separately, the ESA prohibits the taking of any endangered species, and defines the term "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt" any such conduct. 16 U.S.C. §§ 1538(a)(1)(B) and 1532(19).

c. The Secretary of the Interior issued regulations defining "harm" for the purposes of the ESA to include significant habitat modification that significantly impairs essential behavioral patterns. 50 C.F.R. § 17.3. The Petitioners read the term "harm" so broadly as to render the term meaningless and to prohibit private activity on private property without regard to the actual presence of any endangered species on that property. The Department of the Interior has prevented private conduct through the threat of civil and criminal prosecution based on the "potential presence" of animals on property and the existence of habitat suitable for the species.

d. The government's prohibition on the use of private property constitutes a taking of that property under the Fifth Amendment and, in the absence of compensation, is prohibited by the Constitution.

2. Under the ESA's criminal provisions, 16 U.S.C. § 1540(b)(1), prosecutors must establish a "knowing" violation, but that knowledge is established by the "general intent" to commit an act. Thus, a rancher who intends to clear brush from his property commits a crime if that brush is later determined to constitute habitat critical to an endangered species.

Accordingly, amici request this Court to affirm the Circuit Court's invalidation of the habitat preservation regulation rendered in this case below.

ARGUMENT

I. The Harm Regulation Takes the Private Property of Ranchers Without Just Compensation in Violation of the Fifth Amendment.

No group in the country is as injured by this regulation as ranchers. Sixteen percent of the land mass of the United States is privately owned by ranchers -- approximately 371 million acres (larger than the collective size of twenty-two states).[1] The government's mere suspicion that a ranch may contain potential "habitat" for a listed species brings ordinary ranching activities to a screeching halt, to avoid a "take" as defined in the habitat preservation regulation. The government's suspicion need not even be based on the actual presence of any of the listed species on the property, for Petitioners define "injury" to the species to mean essentially "modification of habitat suitable for the species." Thus, the ESA's prohibitions against hunting, wounding or killing listed species are transformed into the taking of private property through a twisted interpretation of the single verb "harm." As numerous documented examples of actual applications of the harm regulation demonstrate, Petitioners have never considered this regulation to be "narrowly tailored"; rather, the government routinely rides roughshod over the Constitutionally protected rights of American ranchers.

A. The Government's Expansive Reading of the Endangered Species Act Violates Ranchers' Constitutional Rights to Use Their Private Lands.

Ranching is, quite simply, the use of land to produce livestock; without land, there is no ranching. Ranching requires that the land be carefully tended to produce water, hay, grass, fodder and other nutriment for livestock, and that erosion or other damage to the land be avoided. Ranching also sometimes requires the clearing of brush, the felling of trees, the building of fences,

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[1] U.S. Dep't of Agriculture, Economic Research Service, Agricultural Resources and Environmental Indicators, (Dec. 1994). This acreage is only the private pasture and range land of ranchers. The acreage is much larger when ranchers' associated crop land is included.

barns, stables and dwellings, and the introduction of other human activities upon the land. Ranching produces food and fiber and numerous byproducts which are essential to our daily lives. Ranching also occurs on vast tracts of rural and relatively undeveloped land, much of which might be suitable habitat for one or more endangered species.

The right to use land is entitled to substantial protection under the United States Constitution. The Constitution of the United States specifically mentions "property" in at least three provisions: the due process clause of the Fifth Amendment ("No person shall...be deprived of life, liberty, or property, without due process of the law..."), the takings clause of the Fifth Amendment ("nor shall private property be taken for public use, without just compensation"), and the due process clause of the Fourteenth Amendment ("nor shall any State deprive any person of life, liberty, or property, without due process of law...."). The Fourth Amendment also protects property interests by ensuring "[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...." These provisions, taken together, underscore the belief of the writers of the Constitution that, unless the right to retain the fruit of one's labor be secure, the other liberties guaranteed by the Constitution are in jeopardy.

Accordingly, it is a founding principle of our nation that private land may not be taken for public use (unless it be purchased from the owner). This basic principle -- that the government must lawfully acquire private land rather than merely seize it -- is predicated upon fundamental notions of fairness. As this Court stated in *Armstrong v. United States*, "[t]he Fifth Amendment...was designed to bar Government from forcing some of the people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." 364 U.S. 40, 49 (1960).

Thus, a regulation which forbids the profitable use of land will be recognized as a violation of the Fifth Amendment, creating a duty on the part of the public as a whole to compensate the rancher who has been deprived of the reasonable use of his land. As the Court stated in *Lucas v. South Carolina Coastal Council*:

> ...[A]ffirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use -- typically, as here, by requiring land to be left substantially in its natural state -- carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm...[a]s Justice Brennan explained: 'From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation...*San Diego Gas & Elec. Co., supra,* 450 U.S., at 652, 101 S. Ct., at 1304 (Brennan, J., dissenting). The many statutes on the books, both state and federal, that provide for the use of lands preventing developmental uses, or to acquire such lands altogether, suggest the practical equivalence in this setting of negative regulation and appropriation.

112 S. Ct. 2886, 2894-95 (1992)

In *Lucas,* this Court noted that it has never set forth the justification for the *per se* rule that a regulation which deprives the landowner of all economically viable use violates the Fifth Amendment. *Id.* at 2894. "Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation...[F]or what is the land but the profits thereof[?]."

Or, as Justice Marshall stated in *Loretto v. Manhattan Teleprompter Manhattan CATV Corp.,* "[a]lthough deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking. . . it is clearly relevant." 458 U.S. 419, 436 (1982).

Moreover, the Constitutional right of a rancher to put his property to beneficial use is as fundamental as his right to freedom of speech or freedom from unreasonable search and seizure. As this Court recently stated in *Dolan v. City of Tigard,* "[w]e see no reason why the Takings Clause of the Fifth Amendment, as much

a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation..." 114 S. Ct. 2309, 2320 (1994).

Because ranchers often own and use such vast tracts of land, they are disproportionately singled out to bear the burden of the habitat preservation regulation. Indeed, taken collectively, ranchers may own more endangered species habitat than any other class of Americans. Accordingly, the greatest part of the burden associated with preserving habitat necessarily falls upon ranchers and other private landowners. A recent report by the U.S. General Accounting Office ("GAO") determined that ninety percent of the 781 species that were listed as of May 1993, have habitat on nonfederal lands. Of these listed species, 517 have over sixty percent of their total habitat on nonfederal lands. Of the 105 species for which critical habitat has been designated, eighty have a portion of their critical habitat on nonfederal lands and forty-three of these have more than eighty percent of their critical habitat on nonfederal lands.[2]

Moreover, the threat to private landowners, including ranchers, is growing rapidly. Under a little-known legal settlement between the Department of the Interior and various environmental groups in 1992,[3] the Department obligated itself to drastically increase the numbers of species to be considered for listing as endangered or threatened. This agreement -- known in some circles as the "critter quota" -- has resulted in the actual listing of an average of one hundred species per year in the last three years, doubling the annual average number of listings in the pervious twelve years and has dramatically increased the acreage constituting habitat associated with those species. This listing frenzy is resulting in federal protection for an unforeseen number of species, well beyond the wildest dreams of the drafters of the ESA in 1973. It does not take a mathematician to calculate the ever-escalating cost to private property owners. When multiplied

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[2] U.S. Gen. Acct. Off., *Endangered Species Act Information on Species Protection on Nonfederal Lands* (Dec. 1994) ("GAO Report").

[3] *Fund for Animals v. Lujan,* Civ. No. 92-800 (D.D.C. Dec. 15, 1992).

against the myriad of everyday activities that are single-handedly swept within the scope of the ESA by virtue of the habitat preservation regulation at issue here, the equation spells disaster for private property owners generally and ranchers specifically. Contrary to the explicit command of the Fifth Amendment, these property owners are not receiving just compensation for the loss of their rights to use their property.

Nor is it a sufficient answer to suggest ranchers simply file "regulatory takings" suits against the federal government to recover the value of the land so taken. The scales of justice are unfairly tipped in favor of the government when ranchers are faced with the threat of losing the use of their land because of regulatory burdens imposed by the habitat preservation regulation. Not only are the laws drafted to ease the litigation burden of the government, but the costs of takings litigation can range in the hundreds of thousands or even millions of dollars, too high for the vast majority of ranchers to bear. Consequently, many ranchers, when faced with a government takings claim, cannot pursue their rights under the Fifth Amendment. The government, on the other hand, does not face a similar shortage of resources (at least in comparison to the individual property owner) and can often pursue a vigorous defense of the case without constraint. Adding to the hardship, procedural hurdles often bar litigation on the merits of takings claims for anywhere from five to ten years.

The following examples of reported cases demonstrate how arduous and interminable the litigation of takings claims against the federal government can be.

On October 2, 1980, Florida Rock Industries was denied a wetlands permit to mine limestone on its property in Southern Florida. In 1982 the company filed suit against the federal government alleging an unconstitutional taking. Following a 1985 judgment in the Company's favor, the government appealed and the case was reversed. In 1990, following another trial, the plaintiff again won, and the government appealed. Again, the case was reversed in 1994, and is now pending yet a third trial. More

than fourteen years after the original permit denial, the company is still waiting to be paid for the taking.[4]

In 1983 the federal government placed groundwater monitoring wells on land owned by Mr. Henry Hendler in Southern California, and issued various orders forbidding certain uses of the property. In September of 1984, Hendler filed suit against the federal government alleging a taking and, after five years of bitter litigation, the case was dismissed in December 1989. Hendler appealed, and the case was reversed by the Court of Federal Appeals in the Summer of 1991. The matter is now set for trial in 1995, more than twelve years after the government first physically invaded Hendler's property.[5]

In January 1979, Whitney Benefits Corporation, was denied a permit to mine coal on its land located in Wyoming. The company filed suit in the Claims Court in August 1983, and the case was dismissed the next year. In January 1985, the Court of Appeals reversed the dismissal and, following several years of litigation, the trial court entered judgment in favor of the plaintiff in October 1989. That judgment was affirmed in 1991, but has been followed by four more years of motions. Thus, more than sixteen years after the permit denial, Whitney Benefits has not yet received payment for the taking.[6]

In May 1982, Loveladies Harbor, Inc. was denied a wetlands permit to develop property it owned in New Jersey, and filed suit in the Claims Court in April 1983. After extensive litigation in both the Federal District Court and the Claims Court, plaintiff was awarded judgment in 1990. The government appealed, then moved to dismiss the appeal. Finally, in 1994, the Court of Appeals for the Federal Circuit affirmed the judgment for

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[4] *Florida Rock Indus. v. United States,* 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied,* 115 S. Ct. 898 (1995).

[5] *Hendler v. United States,* 952 F.2d 1364 (Fed. Cir. 1991).

[6] *Whitney Benefits, Inc. v. United States,* 926 F.2d 1169 (Fed. Cir.), *cert. denied,* 502 U.S. 952 (1991).

plaintiff -- more than twelve years after the original permit denial.[7]

A regulation which proscribes Constitutional and protected speech under the First Amendment will not be permitted to stand, *Meyer v. Grant*, 486 U.S. 414 (1988), nor will a regulation which violates constitutionally-protected freedom from unreasonable search and seizure, *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). As the Court of Appeals for the District of Columbia Circuit recently recognized, a regulation likely to result in massive Fifth Amendment property rights violations must also be struck down. *Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

Every bit as much as a regulation that restricts speech, the regulation of private property here must be held up under the strong light of Constitutional scrutiny; this Court must apply that scrutiny to determine whether or not the harm regulation "goes too far [and] will be recognized as a taking." The protection of endangered species may well be a highly laudable governmental goal; but, as Justice Holmes stated in the landmark decision, *Pennsylvania Coal Co. v. Mahon*, "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for a change." 260 U.S. 393, 416 (1922). Indeed, Congress has provided the Secretary with authority to acquire endangered species reserves in Section 5 of the Endangered Species Act, 16 U.S.C §1534(a)(2); "the Secretary is authorized to acquire by purchase, donation, or otherwise, lands, waters, or interests therein, and such authority shall be in addition to any other land acquisition authority vested in him." The Secretary cannot be permitted to accomplish through the back door of regulation that which he chooses not to accomplish through the front door of compensation.

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[7] *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545 (Fed. Cir. 1994).

B. The Fish and Wildlife Service ("FWS") Routinely Prohibits Private Activity that It Interprets to be a "Take" Because the Activity Modifies Habitat that Might Support an Endangered Species.

The Petitioners' interpretation of "take" is so broad as to render the term meaningless. Operating in a world in which Lewis Carroll would feel comfortable, the Petitioners' twist the meaning of "actual killing or injuring wildlife" until civil and criminal exposure lie for disturbing habitat where a member of an endangered species could potentially seek food or shelter. This went too far for the Circuit Court, which invalidated the harm regulation in part because "the nine verbs accompanying 'harm' all involve a substantially direct application of force, which the Service's concept of forbidden habitat modification altogether lacks." *Sweet Home Chapter v. Babbitt*, 17 F.3d 1463, 1465 (D.C. Cir. 1994).

Petitioners take exception to this holding and attempt to convince the Court that the Secretary's definition of "harm" is a "carefully tailored regulation" that only prohibits modification of habitat that actually results in killing or injuring listed species. (Petitioner's Brief, at 16). When correctly understood, however, actually the FWS' regulation prohibits habitat modification that affects the "potential presence" of a member of an endangered species.[8] The true meaning of the regulation in question is

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[8] Letter from Brooks Harper, Office Supervisor, FWS, Southern California Field Station, to Michael F. Rowe, dated June 5, 1992 ("Rowe letter"). The text of the document is appended as Exhibit A. A copy of the original document is lodged with the Clerk of the Court under separate cover. The letter states, *inter alia,* the following:

> The Fish and Wildlife Service (Service) would like to advise you of the potential presence of the federally listed endangered Stephens' kangaroo rat . . . .

(continued...)

revealed by the way the Secretary routinely interprets that regulation in the field, supporting the Circuit Court's conclusion that the Secretary's definition of harm was neither authorized by Congress nor a reasonable interpretation of the ESA. 17 F.3d at 1464.

The Circuit Court avoided providing an improperly broad reading of the term harm by applying the doctrine of *noscitur a sociis*, which "is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." 17 F.3d at 1465, *quoting Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961). The Circuit Court found the definition of harm to include "significant habitat modification or degradation . . [that] significantly impair[s] essential behavioral patterns" to be overly broad. 17 F.3d 1463-64. The court contrasted the broad interpretation given to harm with the specificity of the other nine accompanying verbs in the statute:

> With the single exception of word 'harm,' the words of the definition contemplate the perpetrator's direct application of force against the animal taken: 'harass, harm, pursue, hunt, shoot, wound, kill, capture or collect.' The forbidden

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[8](...continued)

> 'Harm' in the definition of 'take' in the Act . . . may include significant habitat modification or degradation where it actually kills or injuries wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering (50 C.F.R. 17.3).
>
> . . .
>
> Be advised that should you take endangered species or migratory birds you are liable for both State and Federal prosecution. The Service is forwarding this information to other appropriate agencies for their information and review.

> acts fit, in ordinary language, the basic model 'A hit B.'

17 F.3d at 1465.

Thus, the Circuit Court concluded that the FWS' broad definition of harm, which includes habitat modification, was so far reaching that it exceeded the authority Congress intended to provide in the ESA.

The Petitioners assert that the regulatory definition of harm is not so broad -- it "does not apply to habitat modification or degradation generally. It reaches only such acts that in turn actually kill or injure wildlife." (Petitioners' Brief at 20). They argue that the regulation's reference to habitat modification "merely elaborates on the basic definition in the first sentence [of 50 C.F.R. 17.3] by explaining its application in one particular context." (*Id.* at 21). They maintain that the phrase "actually kill or injure wildlife," is susceptible to many meanings because there is no real difference between "killing or injuring of protected wildlife where that consequence is brought about by the destruction of habitat essential for the wildlife's breeding, feeding, or shelter, rather than by other means, such as the discharge of a firearm or similarly direct application of force." (*Id.*) The Petitioners assert that an expansive definition of the regulation does not extend beyond the actual killing or injuring of wildlife and thus does not exceed the terms of the ESA:

> An action may result in the destruction or adverse modification of critical habitat, and yet not result in a taking of an endangered species because it does not 'actually kill or injure wildlife.' For example, where there is an area designated as critical habitat for a species but not currently inhabited by the species, a federal agency may be prevented . . . from . . . action in the area, such as the harvesting of trees that, if allowed to stand, would likely attain the attributes of suitable habitat

> for the species. Harvest of a similar area would not, however, be prevented by the Section 9 'take' prohibition.

(*Id.* at 42).

Properly understood, however, the Secretary's interpretation does extend the regulation beyond any common sense definition of killing or injuring wildlife. The FWS has relied on the broad definition of harm to repeatedly prevent exactly the type of action the Petitioners assert now would not be prevented by the Section 9 "take" prohibition. The FWS has consistently argued before lower courts that the harm regulation, properly read, does not require anything more than the disturbance of habitat that might be used by members of an endangered species. In this way, the FWS applies the harm regulation to private property without regard to whether the property is currently inhabited by a species.

The Petitioners continue to embrace and rely upon the Ninth Circuit's decision in *Palila v. Hawaii Department of Land and Natural Resources*[9] as the "proper" interpretation of the regulation.[10] In that case, the defendant was not alleged to have killed or injured a specific bird or even to have chopped down a tree that might have provided shelter or sustenance to the bird.

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[9] 471 F. Supp. 985 (D. Haw. 1979) ("*Palila I*"), *aff'd.*, 639 F.2d 495 (9th Cir. 1981) ("*Palila II*"), *proceeding reopened*, 649 F. Supp. 1070 (D. Haw. 1986) ("*Palila III*"), *aff'd.*, 852 F.2d 1106 (9th Cir. 1988) ("*Palila IV*").

[10] The FWS relied on *Palila* in administrative prosecution assessing damages of $300,000 for modifying habitat suitable for the Tipton Kangaroo rat by plowing the ground. *Valley Communities, Inc.*, INV 3502 AN (U.S. Dep't of Interior, Office of the Solicitor, Civ. Penalty Proceeding, Notice of Assessment, Aug. 12, 1994). Moreover, the FWS applied the habitat preservation rule despite the Circuit Court's ruling in *Sweet Home* because, "this ruling is not applicable in the Ninth Circuit." *Id.* at 7, n.1.

Instead, the defendant was found to violate the law by failing to prevent feral animals from eating shoots that could eventually grow into trees that could provide shelter or sustenance to certain endangered birds.

In *Palila I*, several interest groups brought suit, naming the Palila bird, a listed species, as plaintiff, claiming that the Hawaii Department of Land & Natural Resources's (the "Department") practice of maintaining feral goats and sheep within an area which had been designated as critical habitat for the Palila constituted a "take" in violation of ESA. The complaint alleged that because the feral goats and sheep ate the shoots and sprouts of the mamane-naio trees, they were suppressing the regeneration of the mamane forest upon which the Palila depends for food (in the form of seeds and pods) and shelter. The Department argued that any effect the feral goats and sheep had on the mamane forest and indirectly on the Palila was only a "potential" injury, and therefore did not fall within the harm regulation. The district court held that the Department's maintenance of feral goats and sheep constituted an illegal "take," reasoning that:

> By consuming the seedlings and shoots, the animals prevent regeneration of the forest, and thus bring about the relentless decline of the Palila's habitat.[11]

The Ninth Circuit affirmed the district court's interpretation of "harm" and the feral goats and sheep were removed from the management area.[12]

In 1984, the Sierra Club reopened the original proceeding to add the mouflon sheep as an animal destructive of Palila habitat. Relying on *Palila I* and *II*, the District Court enjoined the

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[11] *Palila I*, 471 F. Supp. at 990.

[12] *Palila II*, 639 F.2d 495.

Department from maintaining mouflon sheep in the management area, stating that:

> A finding of 'harm' does not require death to individual members of the species: nor does it require a finding that habitat degradation is presently driving the species further toward extinction. Habitat destruction that prevents the recovery of the species by affecting essential behavioral patterns causes actual injury to the species and effects a taking under section 9 of the Act.[13]

On appeal, the Government filed an *amicus curiae* brief in support of affirming *Palila III*.[14] The Ninth Circuit affirmed, noting that in both *Palila I* and *Palila III*, the district court defined harm "to include habitat destruction that could result in the extinction of the Palila. . . ."[15]

The Petitioners' continuing embrace of the reasoning in *Palila IV* is also shown by their reliance upon the case here, despite their assertion that the "narrowly tailored" regulation requires actual death or injury of a species, and by their decision to restrict the application of the D.C. Circuit's decision in this case. The Department of the Interior has specifically determined that, despite the finding of the D.C. Circuit here that habitat

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[13] *Palila III*, 649 F. Supp. at 1075.

[14] The Government took the position that the district court erred when it defined harm as including habitat modification that would only prevent or delay recovery of the Palila. *Palila IV*, 852 F.2d at 1108 n.4. Having found that the mouflon sheep's eating habits "could drive the Palila to extinction," *Id.* at 1108, the Ninth Circuit declined to address whether habitat degradation that merely retards recovery of the forest could constitute harm under the Secretary's regulation, *Id.* at 1110.

[15] *Palila IV*, 852 F.2d at 1108.

modification must kill or injure identifiable animals before it can constitute a "take" under the ESA, the Department follows the more expansive rule articulated in *Palila* to prosecute individuals in the Ninth Circuit.[16]

Out in the real world, the FWS uses its expansive definition of the harm regulation to forbid the disturbance of habitat that may potentially affect an endangered species. In June 1991, FWS sent letters to 550 ranchers, farmers and homeowners identified through a review of county property records as "owning property which may contain 'scrub' habitat, essential to [the Florida scrub jay]."[17] The FWS defined scrub habitat "as a sandy area which supports a dense, but often patchy, layer of woody shrubs, with little or no ground cover." This sandy area with woody shrubs is the "type of habitat that may be occupied by Florida scrub jays." The FWS then informed the residents of the prohibition of taking endangered or threatened species, provided the regulatory definition of "harass" and "harm," and made the following pronouncement:

> Harm is further defined as an act which actually kills or injures wildlife. It is the Service's position that destruction of scrub habitat will significantly affect this species.... As a landowner, you are responsible to ensure that actions carried out on your property are not harmful to the scrub habitat or listed species it supports.

Lykes Bros. letter.

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[16] *See* discussion at *supra* at p. 14, fn. 10.

[17] Letter from David J. Wesley, Field Supervisor, FWS, Jacksonville, Florida to Lykes Brothers, Inc., dated June 13, 1991 ("Lykes Bros. letter"). The text of the document is appended as Exhibit B. A copy of the original document is lodged with the Clerk of the Court under separate cover.

The letter, which was not limited to owners of land where the scrub jay actually was to be found, assured landowners that "[a]lthough this may appear to be a burden, there is a procedure to resolve this conflict." The procedures for resolution required the landowner to apply for and receive "take" permits under either Section 7 or Section 10(a) of the ESA. Thus, by verbal sleight of hand, the Secretary transformed "injury to the species" into "destruction of the scrub habitat," rendering such habitat modification an illegal "take" under the statute. *Id.*

Another Florida rancher received a letter from the FWS demanding the cessation of certain activities that had the "potential to impact Florida scrub jays."[18] There was no confirmation that scrub jays actually occupied or had ever occupied the property, but the rancher was prohibited from clearing land to plant some blueberry bushes for his personal, non-commercial use. The FWS stated:

> This letter is regarding ongoing land-clearing activity taking place at River Ridge Ranches, Inc. . . . This and any planned clearing activities have the potential to impact Florida scrub jays. These birds are federally listed as threatened, and any land-clearing activity may result in incidental take of the species. Any activities at this site must be stopped immediately.

Merriman letter.

The letter informed the rancher of the procedure to seek a permit under Sections 7 and 10(a) of the ESA, and concluded with a warning:

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[18] Letter from David J. Wesley, FWS Field Supervisor, to Curtis W. Merriman, dated May 13, 1993 ("Merriman letter"). The text of the document is appended as Exhibit C. A copy of the original document is lodged with the Clerk of the Court under separate cover.

> 'Taking' a listed animal, such as the Florida scrub jay, without fulfilling the requirements of one of these two methods would violate the Act.

Id.

Accordingly, the FWS' broad interpretation of "take" required the landowner to obtain a "take" permit from the federal government for any land clearing activities that had the potential to impact Florida scrub jays, without reference or regard to whether any such scrub jays actually existed on the property. In this way, the FWS prohibited habitat modification that in no way "actually killed or injured wildlife" which might or might not be on the property. [Emphasis added.]

The Florida scrub jay experience represents the rule and not the exception. In Texas, for example, the potential to impact the golden-cheeked warbler is used to prohibit habitat modification on private property without regard to whether any golden-cheeked warblers inhabit or use the property. The FWS sent a letter to a landowner in a residential area near Austin, Texas, to inform her that her property "would be suitable habitat for the federally listed endangered golden-cheeked warbler and/or the cave invertebrates."[19] Based on the belief that her land "would be suitable habitat" for endangered species, and without any indication that any endangered species actually used or existed on the land, the FWS informed the landowner that, "[w]e believe that clearing or land development-related activities of this acreage would constitute a 'take' as defined by Endangered Species Act." Krueger letter.

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[19] Undated letter from Sam D. Hamilton, FWS State Administrator to Marge Krueger, responding to her June 7, 1993 telephone call ("Krueger letter"). The text of the document is appended as Exhibit C. A copy of the original document is lodged with the Clerk of the Court under separate cover.

The FWS has even used the broad language of the habitat preservation regulation to prevent the development of land which would contribute to "encroaching urbanization" which, while not directly affecting any specific animal, would reduce the habitat adjacent to places where the golden-cheeked warbler has been sighted. A landowner seeking to develop his property was denied that right by the following interpretation of the harm regulation:

> Current biological information indicates that encroaching urbanization adversely affects the golden-cheeked warbler through habitat reduction, fragmentation, increase in certain predators, and other factors. Development of lots on Foxtree Cove, which are adjacent to one of the largest blocks of contiguous, occupied golden-cheeked warbler habitat remaining in Travis County, would contribute to the negative impacts mentioned above.[20]

Development of the above property was never shown to actually kill or injure wildlife, except under an elastic definition of those terms that equates encroaching urbanization generally with killing or injuring endangered species. Such a definition is so broad as to be both all encompassing and meaningless.

In California, the FWS acts to protect kangaroo rats by, *inter alia*, prohibiting the construction of a proposed fire break on privately owned land that had the "potential presence" of the Stephens' kangaroo rat. The FWS asserted, in a letter to the landowner, that construction and maintenance of the fire break would constitute significant habitat modification that actually killed

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[20] Letter from Sam D. Hamilton, State Administrator, to Lee Sherrod, dated July 25, 1991. The text of the document is appended as Exhibit E. A copy of the original document is lodged with the Clerk of the Court under separate cover.

or injured wildlife and would therefore violate the ESA.[21] In its letter to the landowner, the FWS stressed "that the Act provides for both civil and criminal penalties." The letter repeated the risk of criminal penalty by stating, "[b]e advised that should you take endangered species or migratory birds you are liable for both State and Federal prosecution." Thus the harm regulation is used by the FWS to threaten criminal prosecution against a landowner who seeks to construct a fire break on land on which kangaroo rats have not been identified, but which have the "potential presence" of those rats.

In this way, the government uses its tremendous resources to overwhelm individual ranchers, farmers and other holders of private property. The expansive definition it gives to the harm regulation permits the federal government to obtain the use of the private property of hundreds of thousands of American citizens without compensating the landowner.

II. The Criminal Enforcement Provisions of Section II of the Endangered Species Act Demonstrate that Congress Did Not Intend Mere Habitat Modification Alone to Constitute a "Take."

In enacting ESA Section 9(a)(1)(B), Congress declared it to be unlawful for any person to take any listed species and appended both civil penalties and criminal sanctions to punish knowing offenders. Understanding the need to identify explicitly the conduct that may subject violators to criminal liability, Congress did not leave the word "take" undefined. Rather, Congress specifically described the conduct that it intended to criminalize by setting forth a precise list of acts that would constitute an unlawful and potentially criminal take, i.e., "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in any such conduct."[22]

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[21] Rowe letter, cited *supra*, at n.8.

[22] 16 U.S.C. § 1532(19).

A rancher knows when he has harassed, harmed, pursued, hunted, shot, wounded, killed, trapped, captured or collected an animal. He is aware that he may be fined or even go to jail if the animal that is the object of any of these actions is a listed species. A rancher also knows when he has erected a fence to contain his animals, cleared a pasture of brush or trees, plowed a field to plant a feed crop for his cattle or a vegetable garden for his family. What he does not know -- because Congress did not intend it to be so -- is that these seemingly beneficial acts in furtherance of his ranching activities constitute a felony if the land, trees or vegetation in question happen to be a habitat which might support an endangered species -- even if it has never been seen on his ranch.

His concern about criminal prosecution under the Endangered Species Act is not hypothetical. From 1988 through 1993, the U.S. Fish & Wildlife Service completed prosecution of 86 criminal cases involving the alleged illegal taking of a listed species on non-federal land. These cases resulted in the imposition of fines ranging from $25 to $50,000 in 59 instances and jail sentences ranging from 10 to 1,170 days in 33 instances. During this same period of time, FWS law enforcement officials have initiated 321 investigations of alleged takings of listed species on private property and one hundred criminal prosecutions. *Seven of these convictions were based solely upon modification of habitat.*[23]

Violations of the Endangered Species Act are essentially prosecuted as strict liability crimes. Section 11 of the Act, 16 U.S.C. §1540(b)(1), provides that "any person who knowingly violates...any regulation [including 50 C.F.R. § 17.3...] shall, upon conviction, be fined not more than $50,000 or imprisoned for not more than one year, or both." This provision does not require that the defendant know that he is violating the regulation; rather, it is a "general intent" criminal provision which merely requires that the defendant knowingly commit the act which

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[23] GAO Report, at 11-13.

constitutes the violation. For example, in *United States v. St. Onge*, 676 F. Supp. 1044, 1045 (D. Mont. 1987), the court rejected defendant's motion to permit him to introduce evidence that he thought he was shooting a non-endangered elk rather than an endangered grizzly bear. Citing the holding in *United States v. Billie*, 667 F. Supp. 1485 (S.D. Fla. 1987), the court refused the proffered instruction, finding instead that Section 11 is more properly understood to impose a "general intent" requirement:

> This construction of the 'knowingly' requirement would best give effect to the regulatory and protective nature of the Act. The purposes of the Endangered Species Act would be thwarted if the court were to adopt the defendant's construction of the Act. The critical issue is whether the act was done knowingly, not whether the defendant recognized what he was shooting. The scienter element applies to the act of taking; thus, defendant could only claim accident or mistake if he did not intend to discharge his firearm, or the weapon malfunctioned, or similar circumstances occurred. Given the regulatory nature of the Act, and its broad purposes to protect listed species, the government cannot be required to prove that he had the specific intent to take a grizzly bear.

For the rancher engaged in planting grass seeds, clearing land, removing weeds, felling trees, running cattle or building fences, 50 C.F.R. § 17.3 simply means that these acts, if they modify habitat appropriate for any one of a thousand endangered species, constitute felonies punishable by federal imprisonment. It is no defense to argue that he did not know that the brush, trees or grasslands in question were habitat for an endangered species, for modification of the habitat constitutes the "take" under the regulation here at issue.

Nor, ironically, does any member of the species have to be harmed in any way for the rancher to be prosecuted. Under

the habitat preservation regulation it is the modification of the habitat (whether or not an individual specimen of the species occupies or has ever used the land in question) which constitutes the "take." Thus it is the modification of the habitat, even if no member of the species is present, which constitutes "injury to the wildlife" -- and is a felony under this regulation. Such strict criminal liability for perfectly innocent and ordinary ranching activities does not pass Constitutional muster under the due process clause. As this court stated in *United States v. International Minerals and Chemical Corp.*, 402 U.S. 558, 564-5 (1971), a case upholding the general intent requirement for persons engaged in inherently dangerous activities: "Pencils, dental floss, [and] paper clips may also be regulated. But they may be the type of product which might raise substantial due process questions if Congress did not require...*mens rea* as to each ingredient of the offense."

Thus, the fact that Congress did intend that a "take" of an endangered species be prosecuted as a general intent crime in order to carry out the purposes of the Act strongly argues that Congress never intended that the Secretary also define as a "take" (and thus a felony) the mere modification of habitat where no member of the species is harmed or injured in any way. To interpret the statute as the Secretary has in the habitat preservation regulation is to establish a criminal penalty for innocuous, productive -- yes, and constitutionally-protected -- activities. *See, e.g., United States v. Billie*, 667 F. Supp. 1485, and *United States v. St. Onge*, 676 F. Supp. 1044. This absurd result is avoided, however, by upholding the determination of the court below that this regulation lies outside the authority granted to the agency by the Endangered Species Act.

The United States' system of criminal law expresses citizens' commonly held view that the commission of certain acts justifies the unleashing of governmental power to prosecute, fine and imprison the offender. This popular consensus is expressed through the enactment of statutes by Congress and the presentation of duly enacted laws to the President for signature. Thus, "[t]he

definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely the creatures of statute."[24] The duty to capture popular consensus in criminalizing certain conduct remains at all times both the privilege and the obligation of the legislature. As Judge Vinson recently observed in *United States v. Mills*,[25] "a delegation doctrine which essentially allows Congress to abdicate its power to define the elements of a criminal offense, in favor of an unelected administrative agency such as the Corps of Engineers, does violence to this time-honored principle." Had Congress intended the modification of potential habitat for endangered species alone to constitute a crime, due process would, (at a minimum) require that the government, in a criminal case, prove that the defendant knowingly destroyed what he knew to be habitat for an endangered species. Like the dog who did not bark in the famous Sherlock Holmes story, Congress' silence in omission of such a provision proves that it did not intend mere habitat modification alone to be prohibited as a "take."

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[24] *Liparota v. United States*, 471 U.S. 419, 424 (1985).

[25] No. 89-3325 (11th Cir. May 15, 1990).

CONCLUSION

For the foregoing reasons, the judgment below of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

March 24, 1995 Respectfully submitted,

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APPENDIX

Exhibit A

United States Department of the Interior
FISH AND WILDLIFE SERVICE

FISH AND WILDLIFE ENHANCEMENT
SOUTHERN CALIFORNIA FIELD STATION
Carlsbad Office
2730 Loker Avenue West
Carlsbad, California 92008

June 5, 1992

Mr. Michael F. Rowe
P.O. Box 507
Winchester, California 92596

Dear Mr. Rowe:

The Fish and Wildlife Service (Service) would like to advise you of the potential presence of the federally listed endangered Stephens' kangaroo rat (Dipodomys stephensi) and also the potential presence of nesting birds protected under the Migratory Bird Treaty Act on the Domenigoni property in the vicinity of your proposed fire break.

It is my understanding that Mr. Davenport of my staff, and Special Agent Petrula of the Division of Law Enforcement, spoke with you regarding potential endangered species conflicts relating to your proposed fire break. I would further like to notify you that there could be an impact on nesting migratory birds. I am

providing the following information on the Endangered Species Act and the Migratory Bird Treaty Act to provide you with clarification of these federal laws.

The Endangered Species Act states that ". . . it is unlawful for any person subject to the jurisdiction of the United States to . . . take any such species within the United States. . ." (16 USC 1538(a) (1) (B)).

"Person" is defined by the Endangered Species Act (Act) as an individual, corporation, partnership, trust, association or any private entity; or any officer, employee, agent, department or instrumentality of the Federal Government, of any state, municipality or political subdivision of a state; or any other entity subject to the jurisdiction of the United States. "Take" as defined by the Act means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or to attempt to engage in any such conduct. It should be noted that the Act provides for both civil and criminal penalties.

Furthermore, "take" in the Act as defined includes the terms "harm" and "harassment". "Harm" in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such action may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering (50 CFR 17.3).

Additionally, "harass" in the definition of "take" in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering (50 CFR 17.3).

The Migratory Bird Treaty Act states that ". . . it shall be unlawful at any time, by any means or in any manner, to pursue,

hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird, any part, nest, or egg of any such bird . . ." (16 USC 703). "Take" means to pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture or collect. "Migratory bird" means any bird, whatever its origin and whether or not raised in captivity, which belongs to a species listed in 50 CFR 10.13, or which is a mutation or a hybrid of any such species, including any part, nest, or egg of any such bird . . . .

Be advised that should you take endangered species or migratory birds you are liable for both State and Federal prosecution. The Service is forwarding this information to other appropriate agencies for their information and review.

It is my understanding that you have been unwilling to cooperate with the Service in resolving this matter in a legal manner. Potential methods exist to reduce fire hazards without taking endangered species or nesting migratory birds. An example would include mowing the site and removing debris rather than discing. I would like to emphasize that the Service appreciates your concern and we remain willing to work with you to resolve any conflicts.

If you have any questions or would like additional information, please contact Art Davenport of this office at (619) 431-9440. Special Agent Petrula can be contacted at (310) 297-0062.

Sincerely,

[s/]Brooks Harper
Brooks Harper
Office Supervisor

cc: Diane Petrula, FWS Law Enforcement, Gardena Office

Exhibit B

United States Department of the Interior
FISH AND WILDLIFE SERVICE
3100 UNIVERSITY BLVD. SOUTH
SUITE 120
JACKSONVILLE, FL 32216

[JUN 13 1991]

Lykes Brothers, Inc.
P.O. Box 1690
Tampa, Florida 33601

Dear Gentlemen:

The U.S. Fish and Wildlife Service (Service), in its effort to protect the Florida scrub jay, has been reviewing property records in Highlands County. As a result of the review, you have been identified as owning property which may contain "scrub" habitat, essential to this species. Scrub is defined as a sandy area which supports a dense, but often patchy, layer of woody shrubs, with little or no ground cover. Typical plants which grow here include sand live oak, myrtle oak, inopine oak, and Chapman oak, along with saw palmetto, scrub palmetto, scattered sand pine, and rosemary. This type of habitat may be occupied by Florida scrub jays, a federally listed threatened species. Two other threatened species which may occupy this habitat are the sand skink and the blue-tailed mole skink, which are small lizards.

The Florida scrub jay (*Aphelocoma coerulescens coerulescens*) is a unique bird subspecies found only in Florida. It is located primarily within your area (the Lake Wales ridge) and portions of the east and west coasts of central and south Florida. The scrub jay is threatened by extinction because of habitat

destruction resulting from agriculture conversion, commercial and residential development, or other uses that result in the destruction of scrub habitat.

The Florida scrub jay is protected by the Endangered Species Act of 1973 (Act), and by regulations published in the Code of Federal Regulations. Under the Act, there is a section that protects endangered and threatened species from human impacts. This section, entitled "Illegal Acts," prohibits the "take" of endangered or threatened species. Take is defined to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Harass is defined as an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. Harm is further defined as an act which actually kills or injures wildlife. It is the Service's position that destruction of scrub habitat will significantly affect this species. Therefore, any activity that destroys scrub occupied by scrub jays may violate the Act. As a landowner, you are responsible to ensure that actions carried out on your property are not harmful to the scrub habitat or the listed species it supports.

Although this may appear to be a burden, there is a procedure to resolve this conflict. Under the Act, there are two ways private landowners wishing to develop their land can legally "take" a threatened or endangered species, like the scrub jay. The first is through Section 7 of the Act, which is used if any federal permit, authorization, or funding is received to develop the property. In some cases, this involves a permit for wetland fill by the U.S. Army Corps of Engineers, loans through the Federal Housing Administration, or any other similar federal action.

The second alternative is described in Section 10(a) of the Act. In this instance, a permit authorizing "take" can be issued by

the Service, provided the applicant accomplishes appropriate conservation measures for habitat protection prior to development activity. The conservation measures are outlined in a document called a Habitat Conservation Plan (HCP), which is a mandatory component of any Section 10(a) permit for taking. An HCP must show that 1) the taking is incidental, 2) impacts to the species will be held to a minimum and unavoidable impacts mitigated, 3) there must be adequate funding for the plan, 4) the taking will not jeopardize the continued existence of the species, and 5) other site specific needs that may develop on a case by case basis.

The Service is interested in developing an HCP for the Florida scrub jay in your area. If you have scrub habitat which you plan to change in some way, you should contact this office for further information on how to get a permit to authorize "take" of scrub jays, or how you may participate in the HCP process. If you have any questions, please call me or Dawn Zattau at 904-791-2580.

These conservation measures are necessary to protect the Florida scrub jay from the possibility of extinction. Because the birds are so dependent on this type of habitat, adequate scrub must be protected from further development to insure the bird's long-term survival. Your cooperation is very much appreciated.

Sincerely yours,

[s/]David J. Wesley
David J. Wesley
Field Supervisor

Exhibit C

United States Department of the Interior

FISH AND WILDLIFE SERVICE
3100 University Blvd. South
Suite 120
Jacksonville, Florida 32216
[MAY 13 1993]

CERTIFIED MAIL

Curtis W. Merriman
319 East Main Street
Avon Park, FL 33825

Dear Mr. Merriman:

This letter is regarding ongoing land-clearing activity taking place at River Ridge Ranches, Inc., bordered on the west by Highway 64 and on the south by Laflam Road, in Highlands County. This and any planned clearing activities have the potential to impact Florida scrub jays. These birds are federally listed as threatened, and any land-clearing activity may result in incidental take of the species. Any activities at this site must be stopped immediately.

In accordance with the Endangered Species Act of 1973, as amended (Act), only two avenues are available to legally "take" a listed species, such as the scrub jay. "Take," as defined in the Act, means "...to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." One avenue is through the Section 7 consultation process using the Incidental Take statement in the Biological Opinion. In order to use the Section 7 process, a Federal agency must be involved in the project. If a Federal

agency is not involved, the other method available is obtaining a Section 10(a)(1)(B) permit by developing a Habitat Conservation Plan in accordance with Section 10 of the Act. "Taking" a listed animal, such as the Florida scrub jay, without fulfilling the requirements of one of these two methods would violate the Act. I have enclosed copies of the Act and the Section 10 regulations for your information.

We recommend you contact Dawn Zattau, of my staff, to determine if "take" will result from your project. The number is 904-232-2580.

Sincerely yours,

[s/] David J. Wesley
David J. Wesley
Field Supervisor

Enclosures

Exhibit D

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

Marge Krueger
6208 Shadow Mountain Drive
Austin, Texas 78731

Dear Ms. Krueger:

This responds to our telephone conversation of June 7, 1993, requesting that this office reevaluate the following property for its suitability as habitat for federally listed threatened or endangered species:

Lot in Jester Point, Phase I, or 7101
Foxtree Cove,
Austin, Travis County, Texas

We have reviewed the information you provided as well as other available information concerning the potential of the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates.

We believe this property would be suitable habitat for the federally listed endangered golden-cheeked warbler and/or the cave invertebrates. We believe that clearing or development-related activities of this acreage would constitute a "take" as defined by Endangered Species Act (Act). The Act prohibits the "take" of a

federally listed species unless the "take" is incidental to an otherwise lawful activity and a section 10(a)(1)(B) permit under the Act has been obtained. Therefore, our biological evaluation of development on the subject lot and compliance with the Act remains unchanged.

We appreciate your concern for endangered species and your desire to comply with the Endangered Species Act. This response is intended to assist you in such compliance. You are ultimately responsible for compliance with all laws, and this letter does not exempt you from complying with current or future federal, state, regional, or local development requirements. If you wish to discuss this further, please contact Alma Barrera at 512-482-5436.

Sincerely,

[s/] Joseph P. Johnston
[for]Sam D. Hamilton
State Administrator

Exhibit E

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Ecological Services
Stadium Centre Building
711 Stadium Drive East, Suite 252
Arlington, Texas 76011
July 25, 1991

Mr. Lee Sherrod
Horizon Environmental Services, Inc.
P.O. Box 162017
Austin, TX 78716

Dear Mr. Sherrod:

This letter is in reference to the remaining undeveloped lots (Block D, lots 15-28; 31; 33-37) on Foxtree Cove, Jester Estates subdivision, Travis County, Texas. In our initial review of this property, we determined, by letter dated July 16, 1990, that clearing of these lots could result in a violation of Section 9 of the Endangered Species Act. In a letter dated June 28, 1991, you requested that we alter our previous determination and concur with your assessment that development of these lots would not adversely impact the golden-cheeked warbler. Surveys conducted in 1990 and 1991 found no suitable habitat for the black-capped vireo or the cave invertebrates, but warblers were observed on either side of Foxtree Cove in 1990, and to the south in 1991.

Current biological information indicates that encroaching urbanization adversely affects the golden-cheeked warbler through habitat reduction, fragmentation, increase in certain predators, and other factors. Development of the lots on Foxtree Cove, which

are adjacent to one of the largest blocks of contiguous, occupied golden-cheeked warbler habitat remaining in Travis County, would contribute to the negative impacts mentioned above. Since warblers have been observed throughout the entire habitat block in 1991 and previous years by your firm and other biologists, we continue to believe that further intrusion into this habitat block could result in a "take" as defined by the Endangered Species Act. Thus, a Section 10(a) permit would be necessary to develop lots 15-28 and 33-37.

However, since Lot 31 is located between existing homes, we believe that development of this lot would not be in violation of Section 9 of the Endangered Species Act. We recommend, though, that clearing and other activities related to development on this lot be restricted to the front 100 feet from the edge of the roadway, and that exterior construction activities not occur between March 15 and August 1.

Thank you for providing pertinent information in this review. If you have any questions or wish to discuss this matter further, please contact Lisa van Hulsteyn at 817-885-7830.

Sincerely,

[s/]Robert M. Short
Robert M. Short
Field Supervisor

cc: City of Austin, Environment and Conservation
Services Department, Austin, TX

FILED
MAR 24 1995
OFFICE OF THE CLERK

No. 94-859

In the

Supreme Court of the United States

October Term, 1994

BRUCE BABBITT, Secretary of the Interior, et al.,
Petitioners,

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, et al.,
Respondents.

On Writ of Certiorari to the
District of Columbia Circuit Court of Appeals

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, ET AL. IN SUPPORT OF RESPONDENTS

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No. 94-859

In the

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BRUCE BABBITT, Secretary of the Interior, et al.,
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On Writ of Certiorari to the
District of Columbia Circuit Court of Appeals

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, ET AL. IN SUPPORT OF RESPONDENTS

IDENTITY AND INTEREST OF AMICI

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae on behalf of itself and California Chamber of Commerce, California Forestry Association, California Licensed Forester's Association, Forest Resources Council, Forest Landowners of California, Western Forest Industries Association, Western Growers Association, California

Cattlemen's Association, California Mining Association, Consulting Engineers and Land Surveyors of California, CalMat, and California Business Properties Association (Pacific Legal Foundation, *et al.*) in support of respondent, Sweet Home Chapter of Communities for a Great Oregon (Sweet Home). Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

This case challenges the validity of United States Fish and Wildlife Service's (USFWS), "harm" regulation (50 C.F.R. § 17.3 (1992)) which forbids habitat modification as an illegal "take" under Section 9 (16 U.S.C. § 1538) of the Endangered Species Act of 1973 (ESA).[1] According to USFWS, such disturbance of habitat might result in injury or death to a member of a species protected by the Act. Amici Pacific Legal Foundation, *et al.*, are organizations which represent a cross-section of California's agricultural, business and natural resource industry interests, and whose members are directly affected by USFWS' "harm" regulation. Amici Pacific Legal Foundation, *et al.*, argue that USFWS' "harm" regulation goes far beyond the intended scope of Section 9 which was designed by Congress merely to forbid human predatory activities directed at listed species.

PLF is a nonprofit, tax-exempt California corporation organized for the purpose of engaging in public interest litigation. Policy for the Foundation is set by a Board of Trustees which evaluates the merits of any contemplated legal action and authorizes action only where PLF's position has broad support within the general community. The filing of an amicus curiae brief has been authorized in this matter.

California Chamber of Commerce is the state's largest broad-based nonprofit membership organization

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[1] Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended in 16 U.S.C. §§ 1531-2544).

which joins the interests of business, industry, and agriculture to work for positive action on key legislative and regulatory issues affecting California's economic and job climate. Membership includes more that 8,000 private employers, including 160 trade associations and 430 local chambers of commerce.

California Forestry Association (CFA) is comprised of 38 forest products companies. CFA's members account for over 70% of the state's forest products. CFA has 79 associate and affiliate members representing a broad array of individuals and companies interested in the well-being of the forest products industry.

California Licensed Forester's Association (CLFA) is a professional organization made up of over 700 licensed foresters and other resource professionals. CLFA represents its members on issues that concern forestry practice in California and provides educational conferences and workshops for its members.

Forest Resources Council (FRC) was formed to strengthen the voice of private forest landowners and the allied industries which process and market forest products in California. FRC's focus is on private forest lands and their increasing importance to future timber production and forest products supply.

Forest Landowners of California (FLC) was formed in 1975 to represent the interests of the state's 30,000 nonindustrial, private timberland owners. With membership in all California counties, FLC is active in seeking regulatory relief and protecting the property rights of its members, as well as providing informational and educational services.

Western Forest Industries Association (WFIA), established in 1947, represents small, independent forest products manufacturers to help maintain a stable and economic supply of timber from public and private lands.

Presently, WFIA represents about 100 businesses throughout the Western states.

Western Growers Association (WGA), formed in 1926, is a nonprofit corporation representing the growers, packers, and shippers of fresh fruits, vegetables, and nuts produced in California and Arizona. WGA members are responsible for handling more than 80% of the fresh vegetables and a majority of fresh fruits and nuts produced in California and Arizona.

California Cattlemen's Association (CCA), a nonprofit corporation, founded in 1917, represents the state's beef cattle industry in legislative and regulatory affairs. Beef cattle producers operate on over 40 million of California's 100 million acres and contributed $1.5 billion to the state's $19.7 billion agricultural economy in 1993. The industry provides more than 26,000 jobs from the ranch level to the processing level in the State of California.

California Mining Association (CMA) is comprised of mining companies located throughout the State of California which ranks third amongst all states in mineral production. CMA's membership includes large and small mining operations that are responsible for the majority of the minerals produced in California. CMA's membership also includes members engaged in mining-related work such as consultants, lawyers, suppliers, and regulators.

Consulting Engineers and Land Surveyors of California (CELSOC) is a statewide, nonprofit association of 950 consulting engineering and land surveying firms. Approximately 55% of CELSOC's members are deeply involved in the early stages of planning and designing needed for residential and public works projects.

CalMat is the largest producer of aggregate building materials in the Western United States. CalMat is recognized for state of the art mining techniques, regulatory compliance, award winning land reclamation projects, and

nationally and internationally recognized habitat restoration programs.

California Business Properties Association (CBPA) is a nonprofit association whose members include developers, builders, lenders, commercial property owners, real estate agents, major retailers, and professional service corporations. With its 5,000 members, CBPA represents the largest consortium of commercial and industrial real estate interests in the State of California.

The proper resolution of this case is vital. Due to its favorable climate and geographical location, California plays host to myriad species protected under the ESA. As of 1994, California provides a home for 128 federally listed species and nearly 1,000 candidates for listing. Endangered Species Blue Print, NWI Resource, Vol. 5, Issue I, Fall 1994. Because it protects endangered species habitat on private property, USFWS' "harm" regulation as applied in this state forbids most types of otherwise permissible, ordinary land use activities on millions of acres of private land. Numerous astonishing examples exist detailing the enormous costs and administrative burdens private landowners have been forced to shoulder as a result of USFWS' "harm" regulation.

1. Taung Ming-Lin, is a Taiwanese immigrant residing in Kern County, California. He was criminally charged with violating Section 9 for plowing his 723 acre farm and purportedly destroying the habitat of ESA-protected Tipton kangaroo rats, blunt-nosed leopard lizards, and San Joaquin kit foxes. Mark Arax, *Immigrant Farmer's Woes Galvanize Conservatives*, L.A. Times, June 10, 1994, at A1. Mr. Lin's land had not been designated as "critical habitat" for any of the three species at issue, but nevertheless his disc and tractor were confiscated under the asset forfeiture provision of Section 11 of the ESA (16 U.S.C. § 1540(e)(4)(B)) by USFWS.

In order to mitigate the claimed "temporary habitat disturbance" caused by Mr. Lin's discing activity, USFWS suggested on October 25, 1994, that the United States Attorney's Office request that Mr. Lin transfer title to, or a conservation easement over, 363 acres of land "of suitable habitat in the project vicinity ... in perpetuity ... to an approved land management entity" and that Mr. Lin also pay $172,425 to the agency for the management and enhancement of the land. Letter from Joel A. Medlin, Field Supervisor for USFWS, to Karen A. Kalmanir, Assistant U.S. Attorney (October 25, 1994) (on file with Pacific Legal Foundation). Such extortion tactics by USFWS have become all too common.

For Mr. Lin the entire ordeal threatens to destroy the $1.6 million investment he made when he purchased his ranch from Tenneco West, Inc., in 1991. As stated by Mr. Lin, "'I do not understand ... if the government wants this land for endangered species -- why doesn't the government buy it?'" Susan Towers, *ESA Turns a Dream to Ashes*, Bakersfield Californian, Jan. 9, 1994, at A4.

2. In October, 1993, wildfire swept through Southern California, charring 25,100 acres of land and destroying 29 homes. David W. Meyers, *Ire After the Fire*, L.A. Times, Nov. 16, 1993, at D1. As reported to the nation on November 19, 1993, by Hugh Downs and Barbara Walters, most homes were lost because property owners were prohibited from discing firebreaks around their properties. Why? Because they were considered to provide habitat for the Stephen's kangaroo rat, an animal protected under the ESA. *ABC News 20/20* (Nov. 19, 1993, Transcript 1349). The properties in question were not designated "critical habitat" for the protected species, rather, they were in a "rat study" area in Riverside County, California.

The people who lost their homes may have been able to save them had they ignored USFWS' warning that discing

firebreaks would modify the habitat of the kangaroo rat and thereby violate the ESA. Michael Rowe, a Riverside real estate agent, ignored USFWS' warnings and disced a swath of land around his home as the blazes approached. The flames did not jump the break and his house was saved. David W. Meyers, *Ire After the Fire*, L.A. Times, Nov. 16, 1993, at D3. Unfortunately 29 other homeowners were not as lucky.

3. The California timber industry has suffered staggering losses as a result of USFWS' regulation protecting endangered species habitat at the expense of private property owners.

The Wagner Corporation, a small family owned timber company established in Stockton, California, in 1895, owns and manages 3,400 acres of forest land near Garberville, California. During the 1993 and 1994 forest season, Wagner found a pair of nesting spotted owls (protected under the ESA) in the middle of an area then scheduled for logging. To prevent a "take" by modifying habitat Wagner could log merely 45% of the trees selected for harvesting. As a result, the company's revenue losses approached $200,000. Since the area is on a 17-year rotation, Wagner will not be able to harvest the area again until the year 2012.

Eel River Sawmills, Inc. (ERS), is another small timber company located in Fortuna, California. Founded in 1948, ERS also has been economically injured by USFWS' determinations regarding the habitat needs of the spotted owl on private lands. Specifically, ERS has been required to leave untouched and standing several million feet of old-growth Douglas fir because according to USFWS any amount of harvest would harm habitat and thus result in the "take" of resident owls. The inability to properly manage its timberlands, in the name of species protection, has caused ERS to suffer considerable economic loss.

Schmidbauer Lumber, Inc., located in Eureka, California, has also consulted with a private property owner who has suffered significant economic loss. In one situation, even though the property owner had completed all permitting including all surveys for protected spotted owl and marbled murrelet necessary to proceed with a harvest under a state Non-Industrial Timber Management Plan, the property owner was told not to proceed because it was discovered that a *neighboring* property contained murrelet sightings. In order to proceed, a 300-foot no-harvest buffer (comprising 15 acres) and a seasonal harvest restriction (April 1-September 15) of one quarter mile buffer (40 acres) were required to be set aside to protect the murrelet. This habitat protection restriction resulted in a significant economic loss for the landowner.

Most recently, in *Murrelet v. Pacific Lumber Company*, Doc. No. C-93-1400-LCB (February 27, 1995), the United States District Court for the Northern District of California issued a permanent injunction barring Pacific Lumber Company from logging a 137-acre parcel of land because the logging could eliminate actual and potential habitat and thus "harm" and "harass" the marbled murrelet. In a footnote to his 60-page opinion, Judge Bechtle ruled that *Palila v. Hawaii Department of Land and Natural Resources*, 852 F.2d 1106 (9th Cir. 1988) (which directly conflicts with the Court of Appeals' decision in the case at bar) allows "significant habitat modification or degradation" to be considered harming an animal, and thus it is a "take." Slip op. at 2. Accordingly, the private property of Pacific Lumber has been rendered valueless.

4. The California building industry and ultimately the public have also suffered startling losses at the hands of USFWS' species habitat protection program on private property. From San Bernardino, California, comes the almost unbelievable story of a "conflict" between the ESA

and the construction of the San Bernardino County Medical Center. In order to mitigate for the presence of *eight* Dehli Sands Flower-Loving Flies, the County had to move and redesign the much-needed medical facility, in addition to providing 1.92 acres of protected habitat. The expenditure was $3,310,199 total or $413,774.25 per fly and resulted in a one-year construction delay. This cost is equivalent to the average cost of treatment of 494 inpatients or 23,644 outpatients.

In Sacramento, California, Sares Regis Group, Inc., is currently in its *seventh* year of attempting to get approval to develop a 1,225 acre planned community. The planned community will meet current and future area needs and is completely consistent with the Sacramento County General Plan. The Sunrise-Douglas project would concentrate badly needed residential housing near both a major employment area and public transit, and is expected to bring badly needed new jobs to the Sacramento economy. The project contains some 85 acres of vernal pools[2] and other marginal wetlands.

Enter the fairy shrimp, tiny invertebrates found by the millions in vernal pools. In September, 1994, varieties of fairy shrimp and the vernal pool tadpole shrimp were listed by USFWS as protected species because of USFWS' unverified belief that habitat for the species is in jeopardy. Fairy shrimp are prolific and are found in vernal pools, man-made stock ponds, drainage ditches, and even tire ruts. One of four fairy shrimp listed as endangered and one that is considered threatened, are found on the Sunrise-Douglas

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[2] Vernal pools are shallow depressions in the ground that fill with water during fall and winter rains and then evaporate in the spring. The water does not percolate downward because of an impervious subsurface layer such as clay, hardpan, or volcanic stratum. Thus, vernal pools are seasonal water bodies that generally do not exist in the hot and dry summer months.

property. Sares-Regis must now modify its wetland mitigation plan to provide additional habitat for the fairy shrimp. The mitigation plan already calls for setting aside 30% of the property as an open space and vernal pool preserve and for creating vernal pools offsite at a rate of 1.3 acres for each acre filled by the project. Now the only question is whether this important project can be kept alive in the face of increased habitat demands by USFWS.

5. The largest producer of aggregate building materials in the Western United States has encountered nearly a decade of problems with the ESA which has consistently thwarted and delayed the company's efforts to mine a parcel of land in San Bernardino, California. In the San Bernardino\Cajon Creek project, CalMat has voluntarily set aside a six-mile habitat corridor, consisting of over 1,670 acres, to protect Riversidian alluvial fan sage scrub. Numerous biological surveys have been conducted by experts but not one has found even a single endangered species on the site. Nevertheless, USFWS warned in a 1994 letter that CalMat has "taken" the Santa Ana River wooly star, the slender-horned spineflower and the California gnatcatcher by virtue of its mining activities. There is no showing that CalMat's activities have or will kill or injure any protected species yet USFWS has invoked its "harm" regulation. This action is clearly designed to protect uninhabited, potential habitat and to chill CalMat's mining activities. USFWS has not yet taken any legal action against CalMat.

The list of examples of landowners whose private property rights have been transfixed by USFWS' "harm" regulation goes on and on. Due to the incredible importance of this issue for private property owners nationwide, amici Pacific Legal Foundation, *et al.*, provide this amicus curiae brief in support of respondents.

OPINION BELOW

The March 11, 1994, opinion of the Court of Appeals issued after granting respondents' petition for rehearing (Pet. App. 1a-41a) is reported at 17 F.3d 1463. The August 12, 1994, statements accompanying the Court of Appeals' denial of petitioners' petition for rehearing and suggestion for rehearing en banc (Pet. App. 89a-99a) are reported at 30 F.3d 190. The July 23, 1993, initial opinion of the Court of Appeals (Pet. App. 42a-72a) is reported at 1 F.3d 1. The opinion of the District Court (Pet. App. 73a-88a) is reported at 806 F. Supp. 279.

STATEMENT OF THE CASE

The ESA is intended to preserve and protect species identified within the meaning of the Act as "endangered" (16 U.S.C. § 1532(6)) or "threatened" (16 U.S.C. § 1532(20)). Species are protected through three basic mechanisms: (1) land acquisition of nonfederal property by the federal government (Section 5, 16 U.S.C. § 1534); (2) compelling federal agencies to act in a manner which ensures their actions are not likely to jeopardize the continued existence of a listed species or modify its critical habitat (Section 7, 16 U.S.C. § 1536(a)(2)); and (3) prohibiting any person from "taking" a listed species (Section 9, 16 U.S.C. § 1538).

The ESA defines the term "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).[3] Although the ESA itself does not further define the terms listed under the congressional

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[3] The prohibitions set forth in Section 9 apply to private as well as public land, regardless of whether critical habitat has been designated. 16 U.S.C. § 1538(a)(1)(B).

definition of "take," USFWS has promulgated a regulation defining the term "harm" as follows:

> *Harm* in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3 (emphasis in original).

The question raised in this case is whether USFWS' definition of "harm" as inclusive of habitat modification exceeds the scope of the "take" provision of Section 9 of the ESA. The proper resolution of this issue is critical as it touches millions of acres of land nationwide. As stated by the *Sweet Home* court in its *per curiam* denial of a petition for rehearing and suggestion for rehearing *en banc* of its prior decision:

> Extending the word "harm" to reach habitat modification as ... conceived [by USFWS] carries [Section] 9's prohibition far beyond the reach effected by all the other terms used in the definition; it applies to every citizen duties the [ESA] expressly imposed only on federal government agencies .... The extension vests [USFWS] with authority to supervise the use of privately owned land in vast tracts of the United States, even to the point of forbidding modest clearing efforts conducted in the interest of fire protection in populated areas. ... Congress clearly did not hang so massive an expansion of government power on so slight a nail as § 9.

Pet. App. 95a-96a (citations omitted).

For the reasons stated below, amici Pacific Legal Foundation, *et al.*, support respondents' request that this Court affirm the decision of the United States Court of Appeals for the District of Columbia Circuit on March 11, 1994, wherein that court struck down USFWS' "harm" regulation as overly broad and neither clearly authorized by Congress nor a reasonable interpretation of the ESA. Pet. App. at 3a.

SUMMARY OF THE ARGUMENT

In reviewing an agency's construction of a statute a court must first determine whether the construction is clearly authorized by Congress or, if not, whether the construction constitutes a reasonable interpretation of the statute. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Applying the first step of *Chevron*, USFWS' "harm" regulation which defines habitat modification as a "take" is not clearly authorized because it directly conflicts with the meaning and intent of the ESA. Specifically, under the basic statutory construction principles of *noscitur a sociis* and *ejusdem generis*, USFWS' broad definition of "harm" is fundamentally inconsistent with the other words Congress used to define "take."

Applying the second step of *Chevron*, it becomes clear that USFWS' "harm" regulation is not a reasonable interpretation of the ESA. First the legislative history of the ESA shows that Congress did not intend to punish the modification of habitat on private lands as an illegal "take" under Section 9. Rather, the text and legislative history of the ESA prove that Congress intended to place habitat protection burdens on the federal government alone and intended Section 9 to prohibit every member of society from engaging in predatory activities directed toward protected species. Additionally, USFWS' interpretation of Section 9 is unreasonable because it renders the habitat protection measures contained in Sections 5 and 7 superfluous.

USFWS' interpretation of "harm" is also unreasonable as it criminalizes otherwise ordinary land use activities and conflicts with the penalty provisions of Section 11. Finally, the "harm" regulation is unreasonable because its terms and application contravene the Fifth Amendment to the United States Constitution.

ARGUMENT

I

CONGRESS CLEARLY INTENDED THAT SECTION 9 "TAKE" PROHIBITIONS WOULD APPLY ONLY TO THOSE ACTIONS WHICH INVOLVE HUMAN PREDATION OF LISTED SPECIES

In reviewing USFWS' interpretation of Section 9 of the ESA, this Court must initially determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 842. "The judiciary is the final authority on [matters] of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n.9. *See also K Mart Corporation v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("'The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress'"). Thus, if this Court finds that the word "harm" in the context of the "take" prohibition of Section 9 clearly does not include habitat modification as encompassed in USFWS' harm regulation, then this Court must strike down USFWS' regulation.

Under one statutory construction principal, *noscitur a sociis*, "a word is known by the company it keeps." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). This principle "is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Id.* In

employing this rule, a court should look for a common thread among the listed words as "'"words grouped in a list should be given related meaning."'" *Dole v. United Steelworkers of America*, 494 U.S. 26, 36 (1990).

Since "harm" can have both narrow and broad meanings, the Court of Appeals below examined the term "harm" in the context of its use in the ESA. Pet. App. at 3a-8a. As noted above, the ESA defines the term "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Applying the principle of *noscitur a sociis*, the Court of Appeals looked to the word "harm"--the indefinite word in the congressional list of acts defined as a "take"--and attempted to derive the term's meaning from its neighboring words. Pet. App. at 4a-5a. The court noted that each of the other terms in the ESA's definition of "take" involve "a substantially direct application of force, which [USFWS'] concept of forbidden habitat modification altogether lacks." *Id.* at 5a-6a. As stated by the court:

> Setting a trap for an animal certainly modifies its habitat, as in a slightly different sense, does firing bullets at it. This obviously does not imply that habitat modifications as the Service uses the term are also encompassed.

Id. at 6a n.1.

Parsing out each of the terms described by Congress as a "take" under 16 U.S.C. § 1532(19), by their dictionary definition proves the accuracy of the Court of Appeals' conclusion in this case. The following definitions are taken from Webster's Ninth New Collegiate Dictionary (1986): (1) Capture: "to take captive ... to gain control of ... by force;" (2) Collect: "to bring together into one ... place;" (3) Harass: "to worry and impede by repeated raids ... to annoy persistently;" (4) Harm: "physical or mental damage,

injury;" (5) Hunt: "to pursue for food or in sport;" (6) Kill: "to deprive of life ... to slaughter;" (7) Pursue: "to follow in order to overtake, capture, kill, or defeat;" (8) Shoot: "to wound or kill with a missile discharged from a bow or firearm;" (9) Trap: "to catch or take ... in a restricted position, confine;" (10) Wound: "an injury to the body."

Each of the terms accompanying "harm" involve activities directed by one particular force against another. Applying the principle of *noscitur a sociis* it is obvious that Congress only intended "take" to include human predatory activities directed toward protected animals.

The Ninth Circuit recently applied the principle *noscitur a sociis* in *United States v. Hayashi*, 5 F.3d 1278, 1282 (9th Cir.), *amended, reh'g denied*, 22 F.3d 859 (9th Cir. 1993), to its interpretation of the Marine Mammal Protection Act (MMPA) as requiring a "direct and significant intrusion[] upon [a] mammal's ordinary activities" in order to find that a mammal had been "harassed" within the meaning of that Act. The court stated:

> The statute groups "harass" with "hunt," "capture," and "kill" as forms of prohibited "taking." The latter three each involve direct, sustained, and significant intrusions upon the normal, life-sustaining activities of a marine mammal; killing is a direct and permanent intrusion, while hunting and capturing cause significant disruptions of a marine mammal's natural state. Consistent with these other terms, "harassment," to constitute a "taking" under the MMPA, must entail a similar level of direct and sustained intrusion.

Hayashi, 5 F.3d at 1282. Under its interpretation, the *Hayashi* court accordingly overturned defendant's conviction for firing a rifle twice into water behind some porpoises because he had not "harassed" the porpoises within the

meaning of the MMPA. *Hayashi*, 5 F.3d 1282. Analogizing from the language in *Hayashi*, the nine verbs accompanying "harm," mainly, "harass, ... pursue, hunt, shoot, wound, kill, trap, capture, or collect," 16 U.S.C. § 1532(19), all involve a substantially direct application of force which USFWS' habitat modification definition lacks altogether.[4]

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[4] USFWS argues in its brief on the merits that "the ruling in *Hayashi* is of no continuing importance, because in the MMPA Amendments of 1994 ... Congress enacted a definition of 'harassment' that is more expansive than the Ninth Circuit's interpretation in *Hayashi*." Brief for Petitioners at 26 n.13 (Brief of Pet.). USFWS' attempt to distinguish *Hayashi* on this basis is a red herring.

The amendments referred to by USFWS added section 16 U.S.C. § 1362(18) to the MMPA which defines the term "harassment" to mean

> any act of pursuit, torment, or annoyance which--(i) has the potential to injure ... or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration,breathing, nursing, breeding, feeding or sheltering.

Obviously, the *Hayashi* court's finding that "'harassment' must entail a ... direct and sustained intrusion" (*Hayashi*, 5 F.3d at 1282) is of continuing vitality. In order to be found liable for "taking" a marine mammal by "harassment" an individual must be found to have pursued, tormented or annoyed a protected marine mammal to such an extent as to have potentially injured the mammal or to have disturbed the mammal's normal behavioral patterns. If anything, the addition of Section 1362(18) to the MMPA merely validates the *Hayashi* court's decision. This interpretation is consistent with the legislative history of 16 U.S.C. § 1362(18) which does not even mention the section as altering the court's decision in *Hayashi* and merely states: "This section

(continued...)

Similarly, the principle of statutory construction known as *ejusdem generis*, counsels a narrow reading of the term "harm."[4] Under this principle, where general words accompany words of specific meaning, such general words are construed as applying only to actions of the same class as those specifically mentioned. *Hughey v. United States*, 495 U.S. 411, 419 (1990). Applied to the congressional definition of "take," the term "harm" can only be reasonably interpreted to include those actions that are directed against, and likely to kill or injure, individual wildlife.

Thus, under the basic statutory construction principles of *noscitur a sociis* and *ejusdem generis*, this Court should strike down USFWS' overly broad definition of "harm" as encompassing habitat modification.

II

USFWS' INTERPRETATION OF "HARM" AS EXTENDING TO HABITAT MODIFICATION IS AN UNREASONABLE INTERPRETATION OF THE ESA

A. Under the Rule of Lenity, This Court Must Construe any Ambiguities in the Congressional Meaning of "Take" in Favor of Respondents

In the event that this Court finds that Section 9 of the ESA or the intent behind it is ambiguous with respect to the validity of USFWS' definition of "harm," under *Chevron's* second step, this Court must decide whether the agency's understanding of the statute is based on a permissible construction or reasonable interpretation of the statute. *Chevron*, 467 U.S. at 843.

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[4] (...continued)
makes technical corrections to the MMPA." S. Rep. No. 220, 103rd Cong., 2d Sess. 17-18 (1994), *reprinted in* 1994 U.S.C.C.A.N. 518, 535-536.

USFWS argues that its regulatory interpretation of "harm" is entitled to enormous amounts of deference. *See* Brief for Pet. at 18-19. However, since violations of Section 9 of the ESA entail both civil and criminal consequences, the rule of lenity counsels otherwise. This rule is triggered if a statute is found to be ambiguous after a court consults traditional canons of statutory construction. *United States v. Shabani*, 513 U.S. ___, 130 L. Ed. 2d 225, 231 (1994). Under the rule of lenity, if an ambiguous statute imposes criminal liability, its application must be *narrowly construed* to protect parties potentially subjected to the liability. *Id.* The rule applies to criminal statutes, even when construed in the civil context. *See United States v. Thompson/Center Arms Co.*, 504 U.S. ___, 119 L. Ed. 2d 308, 319-320 (1992) (applying rule of lenity in a civil context); *Crandon v. United States*, 494 U.S. 152, 157-58 (1990) (applying rule of lenity in a "civil remedy" context). The rule of lenity ensures "both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." *Crandon*, 494 U.S. at 158.

If this Court is unsuccessful in discerning Congress' intent as to the scope of the "take" provision set forth in Section 9 of the ESA, it should apply the rule of lenity and narrowly construe Section 9 to resolve the surrounding ambiguity.

B. The Legislative History of Section 9 Does Not Support USFWS' Interpretation

The legislative history of the ESA supports a rejection of USFWS' extension of Congress' Section 9 "take" prohibition to encompass habitat modifications.

When Section 9 was originally before the Senate Commerce Committee, a definition of "take" was rejected which would have expressly included habitat modification. The bill, introduced before the committee, defined "take" as including "'the destruction, modification, or curtailment of

[a species'] habitat or range.'" Endangered Species Act of 1973: Hearings on S. 1592 and S. 1983 before the Subcomm. on Environment of the Senate Comm. on Commerce, 93rd Cong., 1st Sess., at 27 (1973) (cited in Pet. App. at 9a-10a (brackets in original)). The committee was well aware of this provision as a number of persons appearing before the subcommittee to whom the bill was introduced stressed the importance of the habitat modification language. *See* Pet. App. at 10a (discussing selected comments).

Nonetheless, the "take" definition which was submitted to the full Senate omitted reference to habitat modification, instead defining "take" to mean "'harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.'" *See* 119 Cong. Rec. 25,663 (July 24, 1973) (cited in Pet. App. at 10a). The deletion can be construed as purposeful in light of the specific hearing testimony which emphasized the importance of the habitat modification language in the "take" prohibition. *See John Hancock Mutual Life Insurance Co. v. Harris Trust and Savings Bank*, 510 U.S. ___, 126 L. Ed. 2d 524, 540 (1993) (finding similarly unexplained deletion to be highly probative of the reach of a statute).

Additionally, "harm" was not included in the original definition of "take" reported by the Senate Committee. Rather, "harm" was added on the Senate floor, as part of a group of "technical and clarifying amendments," and its meaning was not debated at any time. 119 Cong. Rec. 25,682-83 (July 24, 1973). It is unreasonable to conclude that Congress would have so greatly expanded the scope of Section 9's "take" provision merely through an undebated technical amendment. Senator Tunney, Chair of the Committee on Merchant Marine and Fisheries which reported the ESA bill and sponsor of the amendment to add the term "harm" to the definition of "take," had stressed the difference between habitat modification and actions

prohibited as takings when introducing the bill to the full Senate:

> Although most endangered species are threatened primarily by the destruction of their natural habitats, a significant portion of these animals are subject to predation by man for commercial, sport, consumption or other purposes. The provisions in [this bill] would prohibit the commerce in or the importation, exportation, or taking of endangered species except where permitted by the Secretary.

119 Cong. Rec. 25,669 (July 24, 1973) (cited in Pet. App. at 9a). Since Senator Tunney's committee had struck "habitat modification" from the original ESA definition of "take" (Pet. App. at 9a-10a (discussion deletion of proposed language)), and since Senator Tunney had stressed the difference between habitat modifications and takes to the full Senate, it would be unreasonable to conclude that Congress intended to expand the scope of the prohibited takes to include habitat modifications merely through the addition of the undebated term "harm" as a technical amendment.

Furthermore, Congress' 1982 amendments do not support USFWS' argument that Congress' addition of Section 10 to the ESA constituted a ratification of USFWS' definition of "harm." *See* Brief of Pet. at 34. In 1982, Congress added Section 10 which authorizes USFWS to issue permits for "any taking otherwise prohibited by section [9] ... if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C § 1539(a)(1)(B). In order to acquire a Section 10 permit, the applicant party must submit a habitat conservation plan (HCP) which specifies the impact that will likely result from the taking and must outline steps that the applicant will take to minimize and mitigate such impacts. 16 U.S.C. § 1539(a)(2)(A).

When it added Section 10, Congress did not alter the Section 9 "take" provision, nor did it explicitly endorse the "harm" regulation. Rather, as stated by the court below, the language set forth in Section 10 merely "implies that *some* prohibited takings are 'incidental' to otherwise lawful activities. ... The trapping of a nonendangered animal, for example, may incidentally trap an endangered species." Pet. App. at 11a (emphasis in original). Thus Section 10 is in harmony with Section 9 because it merely sets up a program under which private parties can get advance permission from USFWS to engage in projects which might otherwise violate the "take" provision of Section 9 by directly killing or injuring listed animals. In exchange for this immunity, the applicant party must agree to offset or mitigate the impact of his activity on the affected species by agreeing to create an HCP.

Furthermore, as discussed at length by the Court of Appeals below, assuming as true the premise that USFWS' interpretation of "harm" violated the original statutory language of Congress in 1973, Congress could not acquiesce in that regulation or alter the scope of the statute without substantively amending the text of Section 9. Pet. App. at 17a. Mere reenactment of an Act without any specific endorsement of an agency's regulation is not enough to ratify a regulation. As stated by the Court of Appeals, "[*i*]*f* the 1982 Congress had *reenacted* the pertinent sections of the ESA *and* 'voice[d] it approval' of [USFWS'] interpretation, it might be appropriate to treat the reenactment as an adoption of that interpretation." Pet. App. at 23a (emphasis in original). However, Congress did not reenact Section 9 nor voice its approval of the "harm" regulation. *Id.* at 23a-24a. Since "the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction." *Leary v. United States*, 395 U.S. 6, 25 (1969).

USFWS' argument, if accepted by this Court, means in essence that when Congress amends a statute it ratifies all prior regulations, erroneous or not, which interpret and administer any part of that statute. Thus, if Congress revisits an Act for purposes of amendment, USFWS essentially makes the argument that Congress must literally review *each and every agency regulation* interpreting and administering that Act to determine such regulations' conformity with the Act. Obviously, congressional responsibilities do not include such onerous and detailed types of reviews and examinations.

Thus, the legislative history of Section 9 indicates that USFWS' definition of "harm" is improper as contrary to the congressionally intended definition of the term "take."

C. USFWS' Interpretation of "Harm" Creates a Conflict Between Section 9 and Sections 5 and 7

Another reason for rejecting of USFWS' definition of "harm" is the definition's inconsistency with the overall framework of the ESA. It is undisputed that the ESA is concerned with two major causes of species decline: (1) the commercial and sport/game taking of individual animals, and (2) the destruction and degradation of protected species' habitats. 46 Fed. Reg. 29,490, 29,491 (June 2, 1981). The Act creates a bifurcated system to deal with these two distinct categories of problems. Specifically, Section 9 is designed to deal with the concern for "commercial and sport/game taking of individual animals" while Sections 5 and 7 address the concern for "the destruction and degradation of protected species' habitats."

Section 7 requires federal agencies to insure that *actions they take* are not likely "to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [the critical] habitat of such species." 16 U.S.C. § 1536(2). Section 5 authorizes federal land acquisitions of nonfederal properties as an additional means for preserving listed

species' habitat. Taken together, these two sections address Congress' concern for the threatened destruction of habitat for listed species. 46 Fed. Reg. at 29,491.

On the other hand, Section 9 was designed to prohibit all human activities that constitute an actual, direct taking of an endangered species of fish or wildlife. The terms set forth in the statute, "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect," 16 U.S.C. § 1532(19), represent forms of conduct that are directed against and likely to kill or physically injure wildlife. This interpretation is supported in the legislative history of Section 9. As stated by Representative Sullivan, whose committee reported the House bill:

> Another hazard to endangered species arises from those who would capture or kill them for pleasure or profit. There is no way that the Congress can make it less pleasurable for a person to take an animal, but we can certainly make it less profitable for them to do so.

119 Cong. Rec. 30,162 (Sept. 18, 1973) (remarks of Rep. Sullivan, House floor manager) (cited in Pet. App. at 9a). *See also* statement by Senator Tunney 119 Cong. Rec. 25,669 (July 24, 1973) (cited in Pet. App. at 9a).

A statute should not be construed in a way that renders other provisions of the statute superfluous. The courts "are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *Mackey v. Lanier Collections Agency & Service, Inc.*, 486 U.S. 825, 837 (1988).

USFWS' interpretation of "harm" renders ESA Section 7 superfluous. If Section 9 truly prohibits habitat modification by any public or private entity as well as human predation of any listed species, then Section 7(a)(2)'s separate directive to federal agencies to not "jeopardize the

continued existence" of a listed species in the collective sense or cause the "destruction or adverse modification of [designated critical] habitat" (16 U.S.C. § 1536(a)(2)) of such species becomes meaningless because such activities are already forbidden to federal agencies under Section 9.[5] Thus, USFWS' definition of "harm" transposes to the private sector habitat protection duties which the ESA was intended to place only on the federal sector.[6]

In fact, USFWS' "harm" regulation expands Section 9 to such an extent that Section 9 is now larger and more encompassing than Section 7. While a federal action may proceed if it does not jeopardize an entire listed species, under Section 9 federal actions constitute forbidden "harm" if they injure only one member of a listed species. Additionally, while Section 7 merely forbids modification of designated critical habitat, Section 9, as interpreted by USFWS, now forbids habitat modification in *any geographical region that can be or is currently occupied by a listed species*! As pointed out in Section 3, "critical habitat shall *not* include the entire geographical area which can be occupied by the threatened or endangered species." 16 U.S.C. § 1532(5)(C). However, USFWS' harm regulation makes no distinction between geographical and

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[5] Section 9 applies to "any person" (16 U.S.C. § 1538(1)). The ESA defines "person" as both private individuals and groups and also as "any officer, employee, agent, department, or instrumentality of the Federal Government." 16 U.S.C. § 1532(13). Thus, Section 9 applies to federal agencies as well as private individuals.

[6] Federal agency duties under Section 7 also apply to activities on private lands which require federal agency action, such as funding a project or approving a permit. Therefore, Section 7 constitutes a significant mechanism for federal control of critical habitat modification on private lands.

critical habitat. As the Taung Ming-Lin and Riverside County fire stories described at the beginning of this brief attest, USFWS' "harm" regulation is being enforced on lands which have *not* been designated as critical habitat for listed species. Thus, the "harm" regulation burdens private citizens with the onerous duty under Section 9 of avoiding habitat modifications anywhere they could injure a listed species, while ESA Section 7 directs federal agencies to merely avoid adverse habitat modifications in designated critical habitat areas.

In addition to the inherent conflict with Section 7, if any geographical habitat modification can be banned as a taking without cost to USFWS, Section 5 is unnecessary. Coupling Section 9 with the Section 11 penalties (16 U.S.C. §§ 1540(a)(1), 1540(b)(1)), USFWS would never need, nor ever have any incentive, to implement the Section 5 program for compensatory land acquisition. There is no indication in the legislative history of Section 9 that Congress intended Section 9 to be used as a means of achieving indirectly that which the government must do directly through Section 5. In fact, USFWS' interpretation undercuts the stated congressional intent in enacting Section 5 to "meet th[e] [habitat modification] problem by providing funds for acquisition of critical habitat" since landowners are "understandably unwilling" to provide habitat benefits to listed species "at excessive cost to themselves." 119 Cong. Rec. 30,162 (Sept. 18, 1973) (remarks of Rep. Sullivan, House floor manager) (cited in Pet. App. at 8a).

Sections 5, 7, and 9 form a rational, nonconflicting program only if the term "take" does not encompass habitat modifications. In order to avoid rendering Sections 5 and 7 superfluous, Section 9 must be interpreted accordingly. Thus, a comparison of Section 9 with Sections 5 and 7, demonstrates that USFWS' interpretation of "harm" is beyond the intended scope of the ESA.

D. USFWS' "Harm" Regulation Does Not Conform with Section 11's Penalty Provisions Which Forbid "Knowing" Violations

Section 9 is enforced through Section 11's penalty provisions which provides for both civil and criminal sanctions. 16 U.S.C. §§ 1540(a) (civil penalties); 1540(b) (criminal penalties). Criminal violators who "knowingly" violate Section 9 face sanctions of up to one year in jail and a $100,000 fine for each illegal "take." 16 U.S.C. § 1540(b); 18 U.S.C. §§ 3559, 3571.

The general knowledge standard for criminal liability requires only a general intent to perform an act, not a specific intent to violate the law. *See, e.g., United States v. Nguyen*, 916 F.2d 1016, 1018-19 (5th Cir. 1990). Thus, if a person were out in the woods tracking a species unknown to him to be protected, but, with an intent to "harass ... pursue, hunt, shoot, wound, kill, trap, capture, or collect [that animal] or to attempt to engage in any such conduct" (16 U.S.C. § 1532(19)) the person could be held liable for "knowingly" violating Section 9.

However, applying USFWS' definition of "harm" which forbids habitat modifications, that same person who has intentionally cut a tree in the forest and thereby *unintentionally* injured the habitat of endangered wildlife may be held criminally liable for an intentional "take" under Section 9. Similarly, if a farmer innocently, yet intentionally, plows his private fields and by so doing unintentionally disturbs the geographical habitat of an animal protected under the ESA, that farmer faces imprisonment and massive fines.

Importantly, the ESA "take" definition also penalizes any "attempt" to "take" a member of a listed species. The reference to "attempt" confirms that Congress intended the "take" prohibition to extend only to activities which involve some purposeful effort to injure wildlife.

USFWS' harm regulation has its most potent application in connection with ordinary land use activities, such as agriculture, timber harvesting, and community development. USFWS may publicly announce that a certain type of land use interferes with the breeding or foraging patterns of a listed species and thereby constitutes an illegal "take" under its own definition. This expression of enforcement intent in turn presumably puts the affected landowners "on notice" and renders any further activities by them illegal. This threat of criminal enforcement has a chilling effect on land use activities which may or may not cause actual injury or death to a member of a listed species. As such, USFWS' interpretation of the term "harm" has rendered unlawful a host of otherwise normal and traditional land use activities which may indirectly affect wildlife but are by no means directed at or intended to injure or kill a member of a protected species.

It is unreasonable to think that Congress would have intended Section 11's penalty provisions for "knowing" violations to extend to the types of unintentional "takes" that may occur employing USFWS' definition of "harm" as encompassing "habitat modification." Absent USFWS' regulatory definition of "harm," habitat modification activities certainly would be beyond the reach of Section 9. Thus, USFWS' radical extension of criminal liability to normal land use practices clearly demonstrates that USFWS' definition of "harm" is unreasonable and fails to conform with Section 11's general knowledge requirement for criminal violations.

III

USFWS' "HARM" REGULATION CONTRAVENES THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

When it enacted the ESA, Congress sought to achieve the objective of protecting the habitat of endangered species without unnecessarily intruding on private property rights or imposing a disproportionate share of the cost of securing a "public good" upon individual private citizens. As discussed above, Congress decided to provide compensated land acquisition under Section 5, and federal oversight of federally permitted activities on private land under Section 7, as the sole mechanisms provided by the Act for protecting needed habitat on nonfederal lands. The expansive definition of "harm" concocted by USFWS, coupled with USFWS' insistence that it need not designate "critical habitat" to trigger its enforcement powers, has resulted in a profound encroachment upon private property rights and has betrayed that clear congressional intent. As the narratives set out in the beginning of this amicus brief attest, USFWS' implementation of its "harm" regulation has had a definite chilling effect upon the exercise of constitutionally protected private property rights.

This Court has stated:

> [W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.

Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council, 485 U.S. 568, 575 (1988).

USFWS' definition of "harm" is not only contrary to the spirit and intent of the ESA, its terms and enforcement

also contradict the Fifth Amendment's prohibition against government takings of private property for public use without payment of just compensation. *See* U.S. Const. Amend. V. Thus, this Court should construe Section 9 to avoid the Fifth Amendment takings problems created by USFWS' "harm" definition which is "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

CONCLUSION

This case presents a critical issue of national importance. By interpreting "take" as encompassing "harm" through "habitat modification," USFWS has criminalized seemingly innocent land use activities on millions of acres of private land throughout the United States. Congress never intended such a result under the ESA.

For the reasons stated above, this Court should affirm the decision of the Court of Appeals which struck down USFWS' "harm" regulation as contrary to the ESA.

DATED: March, 1995.

Respectfully submitted,

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BRUCE BABBITT, SECRETARY OF THE INTERIOR, et al.,

Petitioners,

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF FLORIDA LEGAL FOUNDATION AND SOUTHEASTERN LEGAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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No. 94-859

In The

Supreme Court of the United States

October Term, 1994

BRUCE BABBITT, SECRETARY OF THE INTERIOR, et al.,

Petitioners,

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF FLORIDA LEGAL FOUNDATION AND SOUTHEASTERN LEGAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI

The Florida Legal Foundation and Southeastern Legal Foundation submit their brief as amici curiae in support of Respondents. In accordance with Supreme Court Rule 37.2, this brief is accompanied by the written consent of the parties, evidenced by letters that have been filed with the Clerk of the Court.

The Florida Legal Foundation is a nonprofit corporation established to promote the public interest in balancing private property rights and public needs for the benefit of all citizens. Recognizing that the adversarial process can function properly only when all parties are afforded effective representation, the Foundation seeks to assure, through advocacy within the legal system, that the rights of Florida property owners are fairly considered and adequately defended against unreasonable restriction or deprivation due to the exercise of governmental power. A primary purpose of the Foundation is to provide legal support for landowners who are disadvantaged in defending their interests, particularly in cases where government agencies or environmental groups possessing superior resources are promoting principles of law that might establish a precedent adversely affecting the property rights of others.

The Southeastern Legal Foundation is a public interest law firm which provides the courts with the views of those who support limited government, individual economic freedom, and the free enterprise system. Southeastern's function is to engage in litigation in support of these principles, and to oppose governmental abuse of authority at all levels. In the course of carrying out this mission, Southeastern provides direct legal representation to parties in civil litigation, and files amicus curiae briefs in selected cases, where important public policy issues are presented. Southeastern appeared as counsel of record in this Court for the petitioner in *Northeastern Florida Contractors v. Jacksonville*, 113 S.Ct. 2297 (1993), and has appeared as amicus curiae in numerous cases, including *Lucas v. South Carolina Coastal Council*, 505 U.S.

___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), and *Dolan v. City of Tigard*, 512 U.S. ___, 114 S.Ct. ___, 129 L.Ed.2d 304 (1994).

As advocates for private property rights, the Florida Legal Foundation and Southeastern Legal Foundation are interested in this case because the regulation at issue substantially impairs the rights of landowners to use their property for productive and otherwise lawful purposes. The impact of the regulation is particularly severe in Florida, which has more endangered and threatened species than any state in the continental United States except California. The Florida Legal Foundation and Southeastern Legal Foundation believe that the court of appeals' decision properly invalidated the regulation as an unauthorized extension of the limited power to control private land use that Congress intended to confer under the Endangered Species Act. This case provides the Court an opportunity to reaffirm its recent pronouncements that government regulations which encroach upon constitutionally protected property rights warrant close scrutiny and require clear support.

STATEMENT OF THE CASE

Amici Florida Legal Foundation and Southeastern Legal Foundation adopt the statement of the case contained in the brief of the Respondents.

SUMMARY OF THE ARGUMENT

To the extent that it prohibits the ordinary and lawful use of private property as a "habitat modification" that causes "harm," and thus constitutes a "take" of protected wildlife, the FWS regulation exceeds the authority delegated by Congress under the ESA. The language and structure of the Act reflect that Congress expressly provided for habitat preservation in the sections that authorized acquisition of private lands and required regulation of lands subject to federal ownership or oversight, but made no mention of habitat protection in the section prohibiting a "take" of listed species. Based on the traditional tools of statutory construction, which must be applied before resorting to extrinsic aids such as legislative history or administrative interpretation, the express reference to habitat modification in some sections but not others signifies a purposeful intent to regulate such activities on federally controlled lands, including private lands subject to federal permitting, but not on purely private property.

Given the fact that the "revealed design" of Congress is evident from the explicit terms of the statute, there is no necessity or justification for reaching policy questions or considering the reasonableness of the agency's interpretation. Nonetheless, the court of appeals' construction is supported by the distinction, presumably known to Congress, between the common law power of government to prohibit direct acts of force against wildlife as an offense against public property, and the constitutional restraint on the power of government to take private property without compensation by regulatory deprivation of use. Consistent with that distinction, Congress

reasonably and responsibly exercised its regulatory power under the ESA only to the extent that it could do so without "going too far" and forcing private landowners to bear the public burden of providing habitat for wildlife.

The FWS regulation, however, crosses that line by mandating habitat preservation on private lands under threat of fine or imprisonment; it thereby transforms the ESA into a land use regulation that subjects the government to potential liability for Fifth Amendment takings of private property. Moreover, the regulation is especially oppressive for small landowners, who have no practical remedy because they lack the resources or the bargaining power to do anything except capitulate to whatever terms are dictated by the FWS. The manifest undesirability of such consequences confirms that this regulation extends the scope of the ESA far beyond the limits contemplated by Congress.

ARGUMENT

I. THE REGULATION DEFINING "HARM," AS USED IN THE ENDANGERED SPECIES ACT PROHIBITION AGAINST A "TAKE" OF WILDLIFE, TO INCLUDE HABITAT MODIFICATION ON PRIVATE PROPERTY NOT SUBJECT TO FEDERAL OVERSIGHT, IS CONTRARY TO THE INTENT OF CONGRESS AS REFLECTED IN THE LANGUAGE AND STRUCTURE OF THE ACT.

The sole question presented here is whether the Endangered Species Act ("ESA"), 16 U.S.C. §§1531 et seq.,

by describing the kinds of conduct prohibited as a "take" of wildlife to encompass acts that "harm" listed species, provides authority for a Fish and Wildlife Service ("FWS") regulation, 50 C.F.R. 17.3, further defining "harm" to include habitat modification that may result from otherwise lawful uses of private property. Although Petitioners and their supporting amici attempt to cast this controversy as one that poses a choice between competing policies, the Florida Legal Foundation and Southeastern Legal Foundation submit that the Court is confronted with nothing more than a straightforward issue of statutory construction. Thus, efforts to influence the resolution of this case based on the purported necessity or desirability of the disputed regulation should not obscure the fact that, in assessing the validity of a regulation, it is not the function of this Court to search for some rationale that would justify acquiescence in the agency's interpretation; rather, it is the duty of the Court to determine whether Congress intended or contemplated that the agency be empowered to exercise the asserted authority. *Presley v. Etowah County Commission*, 502 U.S. ___, 112 S.Ct. 820, 117 L.Ed.2d 51, 67 (1992).

When an agency's construction of a statute it administers is challenged, the Court must first endeavor to discern the intent of Congress from the language and structure of the Act. "If a Court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). Where intent can be determined from the face of the statute, there is no need to resort to

extrinsic aids, such as legislative history, *Ratzlaf v. United States*, 510 U.S. ___, 114 S.Ct. ___, 126 L.Ed.2d 615, 626 and n.18 (1994), or administrative construction. *Estate of Cowart v. Nicklos Drilling*, 505 U.S. ___, 112 S.Ct. 2589, 120 L.Ed.2d 379, 388-89 (1992); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 445-48 (1987). Only if Congress has not addressed the issue and the statute discloses no intent, thus creating an ambiguity or leaving "a gap for the agency to fill," will the Court reach the question of whether the regulation constitutes a permissible and reasonable construction to which deference is due. *Chevron*, 467 U.S. at 843-44.

Where, as here, the regulation does not involve a technically complex matter, but inherently infringes upon constitutionally protected property rights, the Court should not infer an intent to delegate authority from mere silence, nor assume an intent to confer authority from the absence of language expressly negating its existence. Rather, the Court should require that the statute on its face reflect an affirmative intent to authorize the extension of federal power.

Turning first to the express language, the word "harm" is not defined in the ESA. Although the term can be interpreted as expansively as the imagination permits, its meaning in this context must properly be confined to the kind of harm that can fairly be regarded as a prohibited "take" of wildlife, which Congress intended to make punishable by fine or imprisonment. The meaning of statutory terms "depends on their context," *Shell Oil Co. v. Iowa Dept. of Revenue*, 488 U.S. 19, 25 (1988), especially when the context "may supply a clarity that the term

lacks in isolation." *Department of Energy v. Ohio*, 503 U.S. ___, 112 S.Ct. ___, 118 L.Ed.2d 255, 270 (1992).

The court of appeals, applying the maxim *noscitur a sociis*, adopted a definition that related "harm" to the other specified forms of "take" based on "a direct application of force against the animal taken." 17 F.3d at 1465. Petitioners contend that this definition is too narrow, because it does not encompass actions that indirectly injure or kill. Amici National Wildlife Federation ("NWF") et al. suggest that the "common denominator" among the words in the "take" definition is that "[e]ach word pertains to acts (or omissions) that detrimentally affect endangered or threatened species," and thus "[t]he detrimental effect, rather than the nature of the act, is the linchpin of a section 9 take." NWF Brief at 23. This definition, however, is manifestly overbroad, because virtually all human activity entails some "detrimental effect" on wildlife.

Any effort to formulate a definition of "harm" that cannot be condemned as either overinclusive or underinclusive may be an exercise in futility; but it is an exercise that the Court need not undertake for purposes of deciding this case. The issue is not whether it is possible to frame a definition of "harm" that will neatly fit every hypothetical situation, but whether the definition promulgated by FWS in the regulation at issue here goes beyond the authority that Congress intended to delegate under the ESA. Assuming, arguendo, that the court of appeals' construction based on associated words within the same section was not sufficiently conclusive on that question, the next stage of analysis requires the Court to

examine other sections of the ESA for guidance as to the legislative intent.

The Act reflects that Congress expressly provided means for habitat preservation in section 5 (acquisition of private lands) and in section 7 (supervision of federal lands and other lands subject to federal oversight), but made no mention of habitat protection in the section 9 "take" prohibition. Although Petitioners insist that the Court should ascribe no significance to this selective use of language in the various sections of the Act, application of the "traditional tools of statutory construction" reinforces the conclusion that Congress did not intend to employ the punitive "take" provision of section 9 as a mechanism for compelling private habitat conservation.

In construing legislative enactments, the Court customarily "follow[s] the cardinal rule that a statute is to be read as a whole, . . . since the meaning of statutory language, plain or not, depends on context," *King v. St. Vincent's Hospital*, 502 U.S. ___, 112 S.Ct. ___, 116 L.Ed.2d 578, 586 (1991) (citations omitted), and the Court's "duty is to give coherence to what Congress has done within the bounds imposed by a fair reading of legislation." *Achilli v. United States*, 353 U.S. 373, 379 (1957). Of particular relevance here are the rules, consistently reaffirmed by this Court, that (a) where Congress " 'includes particular language in one section of a statute but omits it in another,' " it " 'is generally presumed that Congress acts intentionally and purposely,' " *Chicago v. Environmental Defense Fund*, 511 U.S. ___, 114 S.Ct. ___, 128 L.Ed.2d 302, 311 (1994) (quoting *Keene v. United States*, 508 U.S. ___, 113 S.Ct. 2035, 124 L.Ed.2d 118, 128 (1993)); and (b) the use of different wording in other sections of the same

statute shows that Congress knew how to signify its intent to draw a distinction in addressing the subject. *Melkonyan v. Sullivan*, 501 U.S. ___, 111 S.Ct. ___, 115 L.Ed.2d 78, 89-90 (1991).

Considered in light of these principles, the fact that Congress explicitly provided for habitat preservation on lands that are federally owned or subject to federal oversight in another section of the same enactment shows that Congress recognized habitat modification as a distinct kind of conduct toward wildlife, and knew how to express an intent that it be subjected to regulation; because of the specific inclusion in section 7, the omission from section 9 is entitled to interpretative significance. Amici NWF et al. argue that it is a "misreading" of the Act to "assume that section 7 reaches habitat degradation but that section 9 does not." NWF Brief at 25. Based on the plain language of these provisions, however, it is hardly possible to do otherwise, because section 7 expressly refers to "the destruction or adverse modification of habitat," while section 9 contains no mention of habitat modification.

Petitioners acknowledge that to achieve the purposes of providing for conservation of ecosystems upon which protected species depend, "the Act contains numerous provisions that specifically address, in varying ways, the protection of habitat." Petitioners' Brief at 24. Having conceded that fact, however, Petitioners invite the Court to bypass the explicit provisions for habitat protection and *imply* an unarticulated Congressional intent to include habitat modification by private landowners as a form of prohibited "take" under section 9. This approach

turns the traditional principles of statutory construction on their head.

Specifically, Petitioners dispute the "suggestion that Congress intended land acquisition pursuant to Section 5 of the ESA to be the exclusive means by which habitat destruction on private lands can be curbed under the ESA," and insist that "[i]t would depart from the ESA's comprehensive design to assume that Congress . . . provided only a single solution to a complex problem – especially one as central to the Act as the habitat of protected species." Petitioners' Brief at 29 n.17. Analysis reveals, however, that it is Petitioners' argument that rests on assumptions which cannot be reconciled with the "comprehensive design" of the ESA.

The first unfounded assumption is that land acquisition under section 5 is the exclusive means by which habitat modification on private land may be regulated pursuant to the Act. As Petitioners themselves concede, the obligation imposed on federal agencies by section 7(a)(2) to ensure that "any action authorized, funded, or carried out by such agency" does not "result in the destruction or adverse modification of habitat of [protected] species" is applicable to activities on private lands that require a federal permit or license. Petitioners' Brief at 7-8. This provision extends the reach of federal regulatory power to encompass and control habitat modification on vast areas of private land that involve projects or uses subject to federal permitting.

Moreover, Petitioners' theory assumes that Congress intended to authorize the purchase of land as an optional method of preserving habitat on private property, even

though the same result could be obtained without payment. Under Petitioners' interpretation of the ESA, section 5 empowers the FWS to create a habitat preserve on private land by paying the owner, while section 9 empowers the FWS to create a habitat preserve on private land by threatening to penalize the owner. At best, such a scheme would invite arbitrary discrimination by enabling the FWS to treat identically situated persons differently, without any apparent standard or basis in the statute for determining which landowners enjoy compensation and which ones suffer confiscation. In the case of a small landowner who lacks the resources to resist or the bargaining power to negotiate a satisfactory compromise, the acquisition option would be rendered illusory, because the FWS would have no incentive to acquire by compensation what it can control by intimidation.

Finally, the notion that Congress would not have provided "only a single solution to a complex problem" ignores the fact that government frequently does not address every aspect of an issue or adopt every solution to a problem, and is not required to do so. As this Court has observed, the government is "not bound . . . to strike at all evils at the same time or in the same way," *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 610 (1935), and "it is not within our province to say that because Congress has prohibited some practices within its power to prohibit, it must prohibit all within its power." *United States v. Petrillo*, 332 U.S. 1, 8 (1947). In this case, the expressed intent of Congress to confine federally mandated habitat preservation on private property to those lands that the government acquires or

already controls may simply reflect the fact that Congress, unlike Petitioners and their supporting amici, respect the constitutionally protected property rights of private landowners.

Because the intent of Congress is evident from the language and structure of the ESA, there is no need to reach the second step of the *Chevron* analysis and consider whether the agency's interpretation, construing the word "harm" to include habitat modification, "defines a term in a way that is reasonable in light of the legislature's revealed design." *Chevron*, 467 U.S. at 844. The FWS definition of "harm" is plainly irreconcilable with the "revealed design" of Congress in the ESA.

Petitioners and their supporting amici nonetheless urge the Court to look beyond the language and structure of the ESA, and uphold the regulation on the ground that it is a wise and desirable policy. They repeatedly emphasize that a stated purpose of the ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," 16 U.S.C. §1531(b), and that Congress expressly intended the word "take" as used in section 9 to be defined "in the broadest possible manner to include every conceivable way in which a person can 'take' any fish or wildlife." S. Rep. No. 307, 93d Cong. 1st Sess. 7 (1973). Those arguments, however, may be readily refuted.

Initially, it is apparent from the face of the ESA that Congress did in fact provide specific means by which ecosystems could be protected and preserved – through the acquisition of land under section 5 and the regulation

of land use under section 7. While Petitioners and their supporting amici may perceive those means as inadequate, the more potent remedy that they implore this Court to approve would require nothing less than a judicial redrafting of the statute; thus, their pleas are misdirected. "It was for Congress to make the choice of the means by which its objective . . . was to be secured, and its judgment . . . is not open to review here." *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 553 (1937).

Furthermore, no one other than Petitioners and their supporting amici would find "conceivable" a scheme under which a private property owner, engaged in ordinary and lawful land uses that are in no way directed at wildlife, could be regarded as guilty of "taking" protected species whose presence may not even be apparent.[1] Amici NWF et al. recognize that "even without the

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[1] Some listed species are so small in size, or so well concealed, or so similar in appearance to related but non-listed species, that ordinary persons cannot detect their presence. The more oppressive impact on private landowners, however, results from the designation of an expansive "range" within which land use activities are forbidden or severely restricted. For example, a study of Florida panther habitat conducted by the FWS, the National Park Service, and the Florida Game & Fresh Water Fish Commission concluded that the "composite home range of 43 panthers encompasses 3.1 million acres or 4,844 square miles," of which "53 percent is privately owned"; that "habitat considered essential in maintaining a self-sustaining population of panthers in south Florida is 1,253,102 acres"; and that the "preferred size" of habitat area required for reintroduction of the animal in north Florida and south Georgia is 500-2,500 square miles. P. Logan, et al., Florida Panther Habitat Preservation Plan 12, 14, 33 (Florida Panther Interagency

harm regulation, the words 'harass,' 'kill,' and 'wound' reach some acts of habitat degradation that injure or kill protected wildlife." NWF Brief at 25. That fact only confirms that the kinds of habitat modification which result directly or by design in demonstrable injury or death are already encompassed within the statutory prohibition, and that the further extension of the ESA's scope by this broad regulation exceeds the authority contemplated by Congress.

Conceding that habitat loss poses the greatest threat to species, and that Congress through the ESA intended to provide a means for conserving ecosystems, it does not necessarily follow that Congress authorized a means other than those expressly provided in section 5 and section 7 for purchasing private lands and regulating federally owned or supervised lands. The question is not whether Congress understood that the preservation of habitat is the most effective or expedient means of protecting listed species; the question is whether Congress intended to authorize the federal government to enforce compulsory preservation of habitat on purely private property under threat of fine and imprisonment. Because

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Committee, 1994). In the case of species such as the northern spotted owl and the red cockaded woodpecker, a "buffer zone" is established around active colonies. See *Sierra Club v. Yeutter*, 926 F.2d 429, 432-33 (5th Cir. 1991); see also *Florida Game & Fresh Water Fish Comm'n v. Flotilla, Inc.*, 636 So.2d 761, 763-65 (Fla. 2d DCA), *rev. denied*, 645 So.2d 452 (Fla. 1994) (development halted in "zone of preservation" surrounding eagles' nests). Where such buffer zones overlap property boundaries, neighboring owners are subject to prosecution for land use activities even though the listed species is not, and may never have been, actually present on their property.

the Act on its face refutes any such construction, the court of appeals' decision should be affirmed.

II. THE REGULATION DEFINING "HARM" TO INCLUDE HABITAT MODIFICATION EXTENDS THE ESA BEYOND THE SCOPE THAT CONGRESS INTENDED BY TRANSFORMING THE ACT INTO AN INSTRUMENT FOR DENYING THE USE OF PRIVATE LAND, THEREBY SUBJECTING THE FEDERAL GOVERNMENT TO POTENTIAL LIABILITY FOR FIFTH AMENDMENT TAKINGS CLAIMS.

The foregoing analysis demonstrates that the language and structure of the ESA evince a clear Congressional intent to provide for habitat preservation on lands that the federal government owns, or has independent authority to regulate, or is willing to purchase; but nothing in the Act supports a prohibition against habitat modification as such on private property. Petitioners nonetheless insist that "[t]here is no reason why Congress would have intended to allow the killing or injury of protected wildlife where that consequence is brought about by the destruction of habitat . . . rather than by other means, such as the discharge of a firearm or similarly direct application of force. . . . " Petitioners' Brief at 21. Because habitat destruction that is *deliberately intended* to kill or injure wildlife can be characterized as a prohibited "take" based on other terms within the statutory definition, such as "kill" or "wound," the critical question posed by Petitioners must be stated more precisely as whether there is any reason why Congress would treat lawful land use activities by private property owners that

indirectly and unintentionally produce detrimental effects on wildlife differently from direct attacks.

The Florida Legal Foundation and Southeastern Legal Foundation submit that there is in fact a legally and logically sound reason why Congress, while prohibiting direct acts of force against protected species, would refrain from imposing penalties on private landowners for engaging in otherwise lawful land uses that may incidentally impair the behavioral patterns of wildlife. Analysis reveals that this limitation on the exercise of federal regulatory authority rests upon a distinction that is rooted in the Constitution and the common law.

At the outset, it merits emphasis that the kinds of acts characterized as "habitat modification or degradation" amount to nothing more than ordinary land uses, many of which are essential to the feeding and sheltering of the *human* species. Such land uses, unless otherwise prohibited by law, are within the constitutionally protected "bundle" of private property rights that the Fifth Amendment forbids the government from taking for public use without compensation, whether the confiscatory effect results from physical occupation or from an equivalent deprivation of use by the exercise of regulatory authority. See *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798, 812-15, 820-22 (1992). Government regulations that deny landowners the economically viable use of their property, even if only temporarily and for a proper purpose, may constitute a compensable taking. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314-19 (1987).

By contrast, the discharge of a firearm or other "direct application of force" against wildlife is not a constitutionally protected activity, because it is settled as a matter of common law that wild animals are public property, which government has the power to protect.

> The wild animals within its borders are, so far as capable of ownership, owned by the state in its sovereign capacity for the common benefit of all of its people. Because of such ownership, and in the exercise of its police power, the state may regulate and control the taking, subsequent use, and property rights that may be acquired therein.

Lacoste v. Department of Conservation, 263 U.S. 545, 549 (1924). Based on this principle, federal legislation that prohibits landowners from killing or injuring protected wildlife, even when necessary to prevent depredation of livestock or other damage to private property, has been upheld against claims that such regulation effects a compensable taking under the Fifth Amendment. See *Christy v. Hodel*, 857 F.2d 1324, 1334-35 (9th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989) (no liability under ESA for depredation of sheep by grizzly bears); *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423, 1426-31 (10th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987) (no liability under Wild Free-Roaming Horses and Burros Act for consumption of forage by wild horses).[2]

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[2] Not surprisingly, the states are eagerly following the federal lead on the strength of these authorities. For example, one state has extended the principle to deny compensation where a private landowner's fenced pastures were invaded and permanently occupied by a herd of tule elk that had been deliberately

Considered in light of these principles, the limitations defined by the language and structure of the ESA are not only understandable, but laudable. In drafting the ESA, Congress presumably acted with knowledge of the power conferred by common law to prohibit direct acts of violence against wildlife, as well as the constitutional restraint on its authority to regulate private land use. Thus, Congress could reasonably and responsibly have made a conscious decision to exercise its regulatory power to the extent – but only to the extent – that it could do so without "going too far," and thereby subjecting the federal government to potential liability for compensable takings of private property.

Insofar as section 9 of the ESA is construed to prohibit "harm" by deliberate and direct acts against protected wildlife, its application is consistent with decisions that recognize such conduct as a punishable offense against public property. By interpreting "harm" to include habitat modification, however, the FWS regulation effectively imposes a burden on the landowner to provide food, shelter, and breeding grounds for "public" wildlife. This Court certainly should not assume that Congress intended what the Constitution does not allow – "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the

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transported to the area under a state relocation program, which specifically contemplated that the animals would forage on private farms and ranch lands. *Moerman v. State of California*, 17 Cal.App.4th 452, 21 Cal.Rptr.2d 329 (1st Dist. 1993), *cert. denied*, ___, U.S. ___, ___ S.Ct. ___, 128 L.Ed.2d 191 (1994).

public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

That the prohibition against habitat modification by private landowners effectively transforms the Act into a pervasive land use regulation cannot be disputed. As recognized by Judge Williams, speaking for the panel majority upon the denial of rehearing en banc, the expansion of the word "harm" to include habitat modification "vests the Department with authority to supervise the use of privately owned land in vast tracts of the United States, even to the point of forbidding modest clearing efforts conducted in the interest of fire protection in populated areas." 30 F.3d at 193.[3] Even amici NWF et al. concede that "[m]any conservation plan restrictions on private land use operate in much the same way as zoning laws," while "[o]ther provisions are analogous to common land use regulations. . . . " NWF Brief at 28.

Petitioners and their supporting amici predictably dismiss or downplay the idea that a prohibition against habitat modification represents a significant impairment

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[3] Evidence supporting Judge Williams' observation is provided in a General Accounting Office report, which reflects that the 31 Habitat Conservation Plans approved by the FWS through June 1994 encompass a total area of more than 1.3 million acres. An additional 132 plans were being developed or awaiting approval. Of the 31 approved plans, four cover the habitat of the Stephens' kangaroo rat in Riverside County, California (including one with an area of 300,000 acres); two others cover the habitat of the northern spotted owl (including one with an area of 383,100 acres). U.S. General Accounting Office, *Endangered Species Act: Information On Species Protection On Nonfederal Lands* 9, 18-20 (December 1994) ("GAO Report"). See also *supra* note 2.

of landowners' rights. In particular, amici NWF et al. assert that "no court has ever found that the harm regulation has caused a Fifth Amendment taking of private property," and that no individual has ever been imprisoned for normal land management activities under the harm regulation. NWF Brief at 14-16 and n.13. Amici NWF et al. further declare that "because species rarely need totally undisturbed habitat, such modifications [of private land use activities] are generally quite modest, . . . enabling private and governmental land uses to proceed apace." NWF Brief at 27. They conclude that "[t]he harm regulation, therefore, does not operate to foreclose private or public land uses." *Id.*

Any suggestion that the FWS regulation prohibiting habitat modification does not significantly inhibit the rights of private landowners to use their property for lawful purposes is sheer sophistry. The fact that enforcement of the regulation has not yet resulted in a compensation award does not mean that Congress intended to authorize the measure; and it certainly does not mean that there has been no serious deprivation of the landowners' rights. It simply means that the FWS has thus far managed to evade liability – a relatively simple matter in light of the prevailing standard for regulatory takings, which effectively forecloses relief under the Fifth Amendment if the regulation leaves a landowner with some economically viable or beneficial use of the property. *Agins v. Tiburon*, 447 U.S. 255 (1980); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

As acknowledged by amicus Friends of Animals, Inc. ("FAI"), "[r]ealistically . . . a 'taking' here would be difficult to establish, since it appears that Respondents'

property has not been the subject of a *total* regulatory taking, depriving Respondents of the *complete* economically viable use of their land." FAI Brief at 9 (emphasis added). This principle, which creates what the Court has appropriately characterized as an "all-or-nothing" situation,[4] enables the FWS to avoid liability for a takings claim by carefully tailoring the application of its prohibition against habitat modification to assure that the landowner is never deprived of all economically beneficial use of the entire property. There are encouraging indications, however, that the "all-or-nothing" rule may be giving way to a more fair and reasonable approach – one that recognizes a right to proportionate compensation for partial takings – both in the courts, see *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560, 1568-71 (Fed. Cir. 1994), *cert. denied*, ___ U.S. ___, ___ S.Ct. ___, 130 L.Ed.2d 783 (1995), and in Congress. See S. 2410 and H. 9, 103d Cong. 2d Sess. (1995). Thus, the likelihood that liability may be imposed for a taking of private property due to the operation of the "harm" regulation – a liability that the FWS will have incurred for an exercise of authority that Congress never conferred – is no longer a remote prospect.

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[4] *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798, 815 n.8 (1992). Although the Court noted that an owner "whose deprivation is one step short of complete" only loses the benefit of the categorical rule, and may still seek compensation by attempting to establish an interference with investment-backed expectations, the complexity, expense, and extraordinary burden of proof that such a proceeding entails will typically present an insurmountable obstacle for small landowners.

Finally, Petitioners argue that "the Section 10 permit program adds flexibility to the 'take' prohibition by enabling private owners' land uses to be accommodated in a way that protects listed species," and that invalidating the application of section 9 to private habitat modification "would upset the careful balance intended by Congress among the many competing interests of private landowners, governmental entities, and the purposes of the ESA." Petitioners' Brief at 49. The notion that habitat conservation plans under section 10 afford a useful mechanism for balancing the regulatory objectives of the FWS with the rights of private landowners is utterly fanciful. Because the process required to prepare, submit, and secure approval for a habitat conservation plan is so costly and time consuming, the section 10 permit program is simply not a viable option for most landowners.[5]

As a practical matter, small landowners have no remedy for the taking of their property by application of the habitat modification ban. When confronted with demands by an agency of the federal government – often supported by state counterparts – that a portion of their property must be preserved for the benefit of protected wildlife, coupled with the threat of fine or imprisonment for failure to comply, ordinary landowners have little or no choice. Caught between the daunting prospect of severe penalties for disobedience and the prohibitive

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[5] Experience bears out this fact. Of the 31 HCPs approved through June 1994, only three involved parcels of less than ten acres, while twice that many covered areas of more than 10,000 acres. See GAO Report, *supra* note 4, at 18-20.

expense of litigation, the landowner is obliged to capitulate. Under these circumstances, whatever terms or conditions are dictated by the FWS will constitute, quite literally, an offer that the landowner cannot refuse. That Congress could have intended such consequences is manifestly inconceivable.

CONCLUSION

The foregoing arguments and authorities demonstrate that the FWS regulation, by compelling habitat preservation on private land under the guise of preventing a "take" of wildlife, not only exceeds the authority delegated by the express terms of the ESA, but entails practical consequences never contemplated by Congress. Although great deference has been accorded to the FWS in the implementation of the ESA since its enactment more than two decades ago, neither Congress nor the courts anticipated that the agency would effectively transform the Act into a land use regulation. By arresting this unauthorized expansion of power, the court of appeals properly restored the ESA to the role that it was intended to fulfill.

Accordingly, the decision of the court of appeals should be affirmed.

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March, 1995

No. 94-859

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.,
Petitioners

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF CONGRESSMAN BILL BAKER (R-CA), CONGRESSMAN RICHARD POMBO (R-CA), AND THE BUILDING INDUSTRY ASSOCIATION OF NORTHERN CALIFORNIA AS *Amici Curiae* in Support of Respondents

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The individuals and organization listed above respectfully file this brief as *amici curiae* in support of Respondents. Written consent has been obtained from counsel for Petitioners and Respondents for the filing of this brief pursuant to Supreme Court Rule 37. The letters reflecting consent have been filed with the clerk's office.

INTEREST OF *AMICI CURIAE*

Congressmen Bill Baker (R-CA) and Richard Pombo (R-CA) are Members of the United States House of Representatives, representing the 10th and 11th Districts in California, respectively. The Congressmen have a two-fold interest in this case. First, as members of the Legislative Branch, they believe

that the U.S. Fish & Wildlife Service, an agency of the Executive Branch, has infringed impermissibly on the power of the Legislative Branch by issuing a regulation that exceeds the scope of the Endangered Species Act of 1973. Second, as the elected representatives of farmers, business people, landowners, and others who are regulated under the Endangered Species Act of 1973, the Congressmen are concerned that the U.S. Fish & Wildlife Service has exceeded the scope of its authority and in the process caused severe hardships for their constituents.

The Building Industry Association of Northern California ("BIANC") is a non-profit association of homebuilders and related professionals. BIANC's members have been adversely affected by the U.S. Fish & Wildlife Service's application of its "harm" regulation to normal homebuilding activities.

STATEMENT OF THE CASE

Amici adopt the statement of the case contained in the Brief for Respondents.

SUMMARY OF ARGUMENT

> Our system of government is, after all, a tripartite one, with each branch having certain defined functions delegated to it by the Constitution . . . . [I]t is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to *administer* the laws.

Tennessee Valley Auth. v. *Hill*, 437 U.S. 153, 193 (1978)(emphasis added).

The issue presented by this case is whether the U.S. Fish & Wildlife Service ("FWS" or "Service"), an agency of the Executive Branch, has exceeded its authority by defining the term

"harm" in the Endangered Species Act of 1973 ("ESA" or "Act"), 16 U.S.C. §§ 1531-1544[1], to include modification of the habitat of endangered and threatened species. *Amici* contend that it has. The Service's expansive[2] definition of "harm" conflicts with Congress' "unambiguously expressed intent"[3] regarding the federal government's authority to regulate habitat modification under the Act.

The argument of *amici* can be summarized thusly. First, as the Service (often) emphasizes, the Act does state that one of its purposes is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved."[4]

Second, in enacting the Endangered Species Act of 1973 and subsequent amendments thereto, Congress created a clear,

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[1] The Endangered Species Act is jointly administered by the Secretary of the Interior and the Secretary of Commerce. The Act delegates most responsibilities to FWS and the National Marine Fisheries Service ("NMFS").

[2] *Amici* have reason to question the Solicitor General's contention that "the court of appeals greatly exaggerated the breadth of the 'harm' regulation," and that there are "significant limitations on the regulation's application." Pet. App. 19. *See, e.g.*, FWS Comments to City of Livermore, Alameda County, California, Regarding Private Development Project Tentative Tract Map #6686 (Aug. 5, 1994)("'Harm' has been further defined to include habitat destruction when it kills or injures a listed species by interfering with essential behavioral patterns, such as breeding, foraging, or resting. *Indirect adverse impacts, such as construction of buildings, roads or fences, that interrupt or prohibit the movement patterns of a listed animal species could be considered 'take' by the Service.*") (emphasis added). In addition, from 1988-93, the Service has on seven occasions prosecuted and obtained convictions under Section 9 of the Act for "modification of habitat." These convictions are distinguished from the 32 convictions based on species mortality. U.S. General Accounting Office, *Endangered Species Act: Information on Species Protection on Nonfederal Land* (Dec. 1994) at 13.

[3] *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984).

[4] 16 U.S.C. §1531(b).

detailed, and unambiguous process under which the federal government would regulate the effects of development projects and other economic activity on the ecosystems (habitat) of endangered and threatened species.

Third, the clear, detailed, and unambiguous process created by Congress is the designation of critical habitat pursuant to Section 4 of the Act, along with the concomitant stricture found in Section 7(a)(2), that any action authorized, funded, or carried out by a federal agency shall not "result in the destruction or adverse modification of habitat of such [endangered or threatened] species which is determined by the Secretary . . . to be critical . . . ."[5]

Fourth, Section 7(a)(2), which reaches not only federal actions and federal lands, but also any action authorized or funded by a federal agency, was intended to provide the *exclusive* authority for federal regulation of habitat modification.

Fifth, the Service's expansive definition of "harm" has allowed it to interpret and administer the critical habitat process—which Congress intended to be the Act's most "influential enforcement tool"[6]—in a manner that is flatly inconsistent with the Act.

Sixth, by regulating habitat modification almost exclusively within the ambit of its expansive definition of "harm," the Service has eviscerated the carefully considered substantive and procedural provisions, including the consideration of economic impacts, that Congress wrote into the critical habitat designation process, with the result being a Service interpretation of the

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5. "This statutory directive is consistent with Congress' stated objective that the ESA 'provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.' " *Northern Spotted Owl* v. *Lujan*, 758 F. Supp. 621, 624 (W.D. Wash. 1991) (quoting Endangered Species Act, 16 U.S.C. §1531(b)).

6. J. Salzman, *Evolution and Application of Critical Habitat under the Endangered Species Act*, 14 Harv. Envtl. L. Rev. 311 (1990) [hereinafter Salzman].

critical habitat provisions that leads to unreasonable and absurd results.[7]

Seventh, the Service has consciously invoked its expansive definition of "harm" to regulate habitat modification in order to avoid the critical habitat designation process, which it perceives to be cumbersome, taxing, and controversial.

In sum, *amici* advance this fundamental argument: in determining whether an agency of the Executive Branch has improperly encroached on the functions of Congress, *i.e.* that it has interpreted a statutory term in a way that is inconsistent with the statute as it is written, or is an unreasonable interpretation of a statutory term, this Court should look primarily within "the four corners of the statute."[8] Within the four corners of the Endangered Species Act, not far from Section 9 and the prohibition on the "take" (including "harm") of endangered or threatened species, one finds a prohibition against the destruction or adverse modification of such species' critical habitat.[9] One also finds a Congressional definition of critical habitat, a detailed process for the designation of critical habitat, and an explicit provision for precluding designation of critical habitat upon consideration of the "economic impact, and any other relevant impact" of designating critical habitat.[10]

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7. *Compare* FWS, Designation of 6 Million Acres as Critical Habitat for the Northern Spotted Owl, 57 Fed. Reg. 1796, 1833 (1992) ("Based on the information discussed in this rule concerning public projects and private activities within critical habitat units, it is not clear whether significant economic impacts will result from the critical habitat designation.") *with* T. Gup, *Owl v. Man,* TIME , June 25, 1990, at 56 ("The possible result [of ESA restrictions]: mill closings and cutbacks costing 30,000 jobs over the next decade. Real estate prices would tumble, and states and counties that depend on those shares of the revenue from timber sales on federal land could see those funds plummet . . . . By decade's end, the plan could cost the U.S. Treasury $229 million in lost timber money each year").

8. *Gustafson* v. *Alloyd Co.*, 1995 U.S. LEXIS 1804, at *42 (Feb. 28, 1995) (Thomas, J., dissenting).

9. 16 U.S.C. § 1536(a)(2).

10. *See* 16 U.S.C. §§ 1532(5)(A), 1533(b)(2), 1533(b)(6)(C), 1533(b)(8).

Amici submit that the Service's expansive definition of "harm" is inconsistent with the language, structure, and intent of the Endangered Species Act of 1973. The Act admits of the regulation[11] of species habitat through one, and only one, mechanism: the critical habitat process. The Service, however, has bypassed the critical habitat process, choosing to regulate habitat through Section 9 and its expansive definition of "harm." In the process, the Service has ignored explicit Congressional policy concerning competing societal interests and the due process rights of property owners throughout the country.

ARGUMENT

THE SERVICE'S EXPANSIVE DEFINITION OF "HARM" IS INIMICAL TO THE LANGUAGE, STRUCTURE, AND INTENT OF THE ACT.

At issue in this case is the validity of a regulation issued by the U.S. Fish & Wildlife Service pursuant to the Endangered Species Act of 1973. The regulation, codified at 50 C.F.R. § 17.3, defines the statutory term "harm" in an expansive manner to include modification of the habitat of endangered and threatened species. Thus, by Executive regulation, the Service has made it a federal crime for private parties to use private property in a manner that the Service deems unsuitable for threatened and endangered species, notwithstanding the fact that there is no federal involvement and the property in question has not been designated critical habitat under the Act.[12]

This result is simply irreconcilable with the Endangered Species Act as it was written by Congress. In the Act, Congress provided an explicit and exclusive vehicle for federal regulation of development projects (both federal and nonfederal) that adversely affect the habitat (whether on federal or nonfederal

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11. As opposed to the preservation of habitat, which is accomplished through the land acquisition provisions of Section 5. 16 U.S.C. § 1534.

12. *See* U.S. General Accounting Office, *Endangered Species Act: Information on Species Protection on Nonfederal Land* (Dec. 1994).

land) of endangered and threatened species. That vehicle is the critical habitat process. As demonstrated below, the Service's definition and administration of the "harm" regulation so marginalizes the critical habitat process, that the result is unreasonable and absurd.[13] It should also be noted that in marginalizing the critical habitat process, the Service has also collapsed Section 7's two distinct standards—"adverse modification" and "jeopardy"—into one, quite contrary to the intent of Congress. [14]

I. THE CRITICAL HABITAT PROCESS IS THE EXCLUSIVE MEANS WHEREBY THE FEDERAL GOVERNMENT IS AUTHORIZED TO REGULATE ACTIVITIES AFFECTING HABITAT UNDER THE ACT.

A. The Existing Critical Habitat Process.

The critical habitat process is clear, detailed, and unambiguous. Section 4(a)(3) of the Act provides that "[t]he Secretary, by regulation promulgated in accordance with subsection (b) and to the maximum extent prudent and determinable shall . . . designate any habitat of such species which is then considered to be critical . . . ." 16 U.S.C. § 1533(a)(3)(A).

Section 3(5)(A) defines critical habitat as "the specific areas within the geographical area occupied by the species, at the time it is listed . . . , on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection . . . and specific areas outside the geographical area . . . upon a determination by the Secretary that such areas are essential for the conservation of the species." ESA at § 1532(5)(A).

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[13] *See Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459 (1892).

[14] *See* Salzman at 329-39; K. Yagerman, *Protecting Critical Habitat under the Federal Endangered Species Act*, 20 Envtl. L. Rev. 811, 833-44 (1990) [hereinafter Yagerman].

Section 3(5)(C) provides that "[e]xcept in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species." ESA at § 1532(5)(C).

Section 4(a)(3) provides that "to the maximum extent prudent and determinable," critical habitat shall be designated concurrently with the determination to list a species as endangered or threatened. ESA at § 1533(a)(3)(A).

Section 4(b)(2) provides that prior to designating any area as critical habitat, the Secretary shall take "into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." ESA at § 1533(b)(2).

Section 4(b)(2) also provides that "[t]he Secretary may exclude any area from critical habitat if he determines that the benefits *of such exclusion* outweigh the benefits of specifying such area as part of the critical habitat, unless he determines . . . that the failure to designate such area as critical habitat will result in the extinction of the species concerned." *Id.* (emphasis added).

Section 4(b)(6)(C) provides that if a final regulation designating critical habitat is not published concurrently with the final regulation listing the species, the Secretary must, within a one-year period, "publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat." ESA at § 1533(b)(6)(C).

Section 4(b)(8) provides that "[t]he publication . . . of any proposed or final regulation . . . shall include a summary by the Secretary of the data on which such regulation is based . . . and if such regulation designates or revises critical habitat, such summary shall, to the maximum extent practicable, also include a brief description and evaluation of those activities

(whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify such habitat, or may be affected by such designation."[15] ESA at § 1533(b)(8).

Section 7(a)(2) provides that any action authorized, funded, or carried out by a federal agency shall not "result in the destruction or adverse modification of habitat of such [endangered or threatened] species which is determined by the Secretary to be critical." ESA at § 1536(a)(2).

The foregoing discussion demonstrates that (1) Congress contemplated federal regulation of endangered and threatened species habitat, (2) Congress crafted a detailed process by which such regulation would occur, and (3) Congress tempered such regulation by mandating the consideration of its economic and other impacts. Since Congress thoughtfully created the critical habitat process, with its balancing of competing interests and its requirement of formal rulemaking, it is difficult to conceive how Congress could have intended to allow the Service to circumvent that process entirely through the use of Section 9. This difficulty is compounded when one considers the history of the critical habitat process.

B. The Original Critical Habitat Process.

The Endangered Species Act, as enacted originally in 1973, neither defined critical habitat nor provided a process for its designation. Indeed, it has been suggested that Congress was "oblivious" to the "potentially absolute power" of Section 7(a)(2), including the prohibition against the destruction or adverse modification of critical habitat.[16]

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[15] 50 C.F.R. § 424.12(c) provides that "[e]ach critical habitat will be defined by specific limits using reference points and lines as found on standard topographic maps of the area. Each area will be referenced to the State(s), county(ies), or other local governmental units within which all or part of the critical habitat is located."

[16] Salzman at 316.

Undefined by the statute itself, critical habitat was defined by Service regulation:

> 'Critical habitat' means any air, land, or water area (exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. The constituent elements of critical habitat include, but are not limited to: physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air. Critical habitat may represent any portion of the present habitat of a listed species and may include additional areas for reasonable population expansion.

43 Fed. Reg. 870, 874 (1978).

Congress did not remain oblivious to the importance of the Act's critical habitat provisions. Nor did it remain oblivious to the Act's lack of standards and procedures for designating critical habitat, or to the Service's expansive definition of critical habitat. As will be discussed below, this Court's decision in *Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153 (1978) ("*Hill*"), brought these issues to Congress' attention in resounding fashion. Also discussed below will be Congress' reaction to the decision—in particular, Congress' wholesale revision of the critical habitat process.

C. The *Hill* Decision and Congressional Reaction: the 1978 Amendments To the Critical Habitat Process.

On June 15, 1978, the U.S. Supreme Court issued its decision in *Hill*. The Court framed the questions presented as follows: "(a) would TVA [the Tennessee Valley Authority] be in violation of the Act if it completed and operated the Tellico Dam as planned? (b) if TVA's actions would offend the Act, is an injunction the appropriate remedy for the violation?" *Hill*,

437 U.S. at 172. Notwithstanding the $100 million that Congress had already expended on the Tellico Dam, the Court held that "both questions must be answered in the affirmative." *Id.*

The Court based its decision on its determination that "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer than those in §7 of the Endangered Species Act. Its very words affirmatively command all federal agencies 'to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence' of an endangered species or 'result in the destruction or adverse modification of habitat of such species . . .' " *Hill*, 437 U.S. at 173 (citation and emphasis omitted).

Applying the language of the Act, language that "admits of no exception,"[17] the Court concluded that operating the Tellico Dam constituted a "carrying out" of an action that had been "authorized" and "funded" by a federal agency, and that such action did not "insure" that the snail darter's habitat would not be disrupted. *Hill*, 437 U.S. at 172. The Court therefore enjoined completion and operation of the Tellico Dam.

In dissent, Justice Powell stated that "I have little doubt that Congress will amend the Endangered Species Act to prevent the grave consequences made possible by today's decision." *Hill*, 437 U.S. at 210 (Powell, J., dissenting). Congress soon proved Justice Powell prescient.[18]

Almost immediately following publication of the *Hill* decision, Congress enacted the 1978 Amendments.[19] The 1978 Amendments effected two substantial revisions to the Act. First, the 1978 Amendments established a Cabinet-level group denominated the Endangered Species Committee. The newly-created

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17. *Hill*, 437 U.S. at 173.

18. *See, e.g.*, Salzman at 317 (the *Hill* decision "halted construction of the dam, triggered hearings on Capitol Hill, and evoked public cries to amend the ESA.").

19. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (1978) [hereinafter "1978 Amendments"].

committee was empowered to exempt a project from the Act if, among other things, the project "is of regional or national significance."[20]

Second, and more important for the question in this case, the 1978 Amendments produced a wholesale revision of the Act's critical habitat provisions. The revision created the critical habitat process that is in place currently, *see supra*.[21]

As previously discussed, Congress' revisions created a clear, detailed, and unambiguous process under which the federal government would have authority to regulate development projects and other economic activity that affected the habitat of endangered and threatened species. The revised critical habitat process included the following elements: (1) an explicit Congressional definition of critical habitat; (2) a presumption against designating a species' entire habitat as critical habitat; (3) a presumption that critical habitat be designated for all listed species; (4) a presumption that the designation of critical habitat be concurrent with the listing of the species; (5) a requirement that the economic impacts of designating critical habitat be considered; (6) a provision allowing the exclusion of any area as critical habitat if the benefits of such exclusion (and therefore the costs associated with inclusion) outweigh the benefits of designating that area as critical habitat; and (7) a presumption that concurrent with the designation of critical habitat, the Service identify those activities that may be affected by the designation.

The scope and detail of the critical habitat process are, themselves, a striking indication of the significance which Congress attached to the critical habitat process. They are also fundamentally inconsistent with the notion that the Act allows

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[20] 16 U.S.C. § 1536(h)(1)(A)(iii).

[21] In 1982 Congress modified that process slightly, providing two narrow exceptions to the requirement that designation of critical habitat occur concurrently with the listing of endangered species. *See* Salzman at 322, 323.

the regulation of species habitat through any other mechanism. This point is underscored when one considers that the 1978 Amendments were a Congressional reaction to the first judicial illustration of the vast potential reach of Section 7's habitat modification provisions.

It is clear that through the 1978 Amendments, Congress intended to restrict the scope of the Act. Equally clear is that Congress intended to do so by limiting federal authority to regulate habitat modification.[22] Indeed, Senator Garn, the Senate sponsor of the 1978 Amendments that revised the critical habitat process, "predict[ed] that the ESA might be gutted entirely

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22. "[T]he existing regulatory definition could conceivably lead to the designation of virtually all of the habitat of a listed species as its critical habitat." H.R. Rep. No. 1625, 95th Cong., 2d Sess. 25 (1978); "[The agency regulation] substantially increases the amount of area involved in critical habitat designation and therefore increases proportionately the area that is subject to the regulations and prohibitions which apply to critical habitats." S. Rep. No. 874, 95th Cong., 2d Sess. 10 (1978). *See also* O. Houck, *The Endangered Species Act and its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. Colo. L. Rev. 278, 297 (1993) [hereinafter Houck] ("The concept of protecting critical habitat . . . was attacked vigorously . . . following the Tellico Dam decision, leading Congress in 1978 to provide two safety valves to its application to development projects. The first, on the front end, is an economic screen for determining critical habitat for listed species . . . . The second . . . is an exemption process for projects that would destroy critical habitat . . . .)."

See G. Coggins and I. Russell, *Beyond Shooting Snail Darters in Pork Barrels: Endangered Species and Land Use in America*, 70 Geo. L.J. 1433, 1495 (1982) ("[W]e think it is time to come to grips with the negative impact of this Act on man. In addition to the Act's adverse effects on the use of federally-owned lands, its potential for infringing upon private property rights is frightening. If a threatened or endangered species has a *critical habitat* on private land, the private landowner could be prevented from enjoying his constitutional right to full use of his land" (emphasis added)) (quoting joint statement of the National Cattlemen's Ass'n, Public Lands Council, and National Woolgrowers Ass'n).

unless it were amended . . . [to] introduc[e] cost-benefit analysis in section 7 decisions."[23] The 1978 Amendments were therefore the product of Congressional balancing of the competing interests of federal regulation of habitat and economic activity. Through its habitual use of Section 9 and its expansive definition of "harm," the Service has done an end-run around the substantive and procedural provisions which Congress deliberately wrote into the Act to reflect that balancing.

II. WHILE CONGRESS INTENDED THE CRITICAL HABITAT PROCESS TO BE A CORNERSTONE OF THE ACT, AND A BALANCE BETWEEN SPECIES' HABITAT REGULATION AND ECONOMIC CONSIDERATIONS, THE SERVICE HAS TRIVIALIZED THE CRITICAL HABITAT PROCESS THROUGH ITS EXPANSIVE DEFINITION OF "HARM."

Commentators, courts, and legislators have recognized that the critical habitat process was to be a cornerstone of the Act.[24]

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[23] Salzman at 319. *See also* 124 Cong. Rec. 21,571, 21,572 (daily ed. July 19, 1978) (statement of Senator Garn) ("[W]e are only at the beginning of our experience with the Endangered Species Act. Over 1,800 plant species and 100 animal species have now been proposed for designation as endangered or threatened; more than 40 different habitats are being considered for designation as critical. And I point out to the Senate that some of these 'habitats' are of enormous size . . . . Senator McClure has already brought to the attention of the Senate the problems coming with the designation of the habitat of the grizzly bear . . . .").

[24] *See* Houck at 297 n.134 (1993) ("Nearly every commentator on the Endangered Species Act has noted the importance Congress placed on protecting the critical habitat of endangered and threatened species."); *Northern Spotted Owl* v. *Lujan*, 758 F. Supp. 621, 626 (W.D. Wash. 1991) ("The designation of critical habitat is to coincide with the final listing decision absent extraordinary circumstances."); 124 Cong. Rec., 21,575, 21,576 (daily ed. July 19, 1978) (statement of Senator Garn) ("It may well be the case . . . that the designation of critical habitat is more important than the designation of an endangered species itself . . . . Placing it on the list does not necessarily do that [protect the species]. If you do not have

(footnote continues)

This view is quite logical, given the language and history of the Act's critical habitat provisions. As envisioned—and written—by Congress, the critical habitat process was to balance the desire to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," with the need to consider the "economic and other impacts" of critical habitat designation. Whatever one's position regarding the wisdom of the 1978 Amendments, there is no denying their purpose and importance. The 1978 Amendments were no afterthought.[25]

The Service's administration of the critical habitat process stands in stark contrast to the scheme envisioned by Congress. Not only has the Service refused to designate critical habitat for the vast majority of listed species,[26] but in the rare instances in which it does designate critical habitat, the Service so trivializes the designation process as to render it virtually meaningless.

Service analyses of the economic impacts of critical habitat designations illustrate this point. As discussed above, the Act explicitly mandates the consideration of the economic impacts associated with critical habitat designations. Congress injected this requirement into the Act via the 1978 Amendments. The 1978 Amendments were enacted by Congress to balance habitat requirements with the economic costs to society resulting from habitat regulation. As shown below, the Service has all but erased economic impacts from the decisional process by construing the economic impacts of critical habitat designation as being

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(footnote continued)

the area designated for its critical habitat . . . then you may have infringements upon that area that could endanger the species.")

25. Indeed, "the inclusion of economic considerations in the designation process was sharply criticized by some [legislators], who argued that such considerations should only arise in the post-listing, post-designation exemption process." Yagerman at 832.

26. As of 1992, FWS and NMFS had not designated critical habitat for 546 of 651, or 84%, of listed species. U.S. General Accounting Office, *Endangered Species Act: Types and Number of Implementing Actions* at 26 (May 1992).

solely those economic impacts that are *in addition* to those occasioned by the listing of the species, in particular those occasioned by the Service's alleged authority to regulate habitat modification under its expansive definition of "harm."

The Service defines the economic impacts of critical habitat as follows:

> "[T]he impacts of designating critical habitat are in addition to the economic and other impacts attributable to (1) listing of the species, (2) economic effects resulting from conservation actions taken by other Federal agencies under section 7(a)(1) of the Act, and (3) regulatory actions required by other laws.
>
> Section 9 of the Act and Service regulations prohibit the taking of delta smelt without express authorization from the Service. Under Service regulations, 'take' may include significant habitat modification or degradation that actually kills or injures protected species . . . . *Therefore, the direct economic and other impacts resulting from designation of critical habitat are relatively small because the Act provides substantial protection of habitat through the listing of the species itself* (emphasis added)."[27]

The foregoing Service interpretation of economic impacts, an inevitable by-product of its expansive definition of "harm," leads to a vast disparity between Service findings concerning the economic impacts of critical habitat proscriptions under the Act,

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[27] NMFS, Designation of Critical Habitat for the Delta Smelt, 59 Fed. Reg. 65,256, 65,261 (1994). *See also* FWS, Designation of Critical Habitat for the Mojave Population of the Desert Tortoise, 59 Fed. Reg. 5820, 5826 (1994) ("The economic analysis assumed those values that were in place prior to critical habitat (e.g., final Bureau of Land Management (BLM) plans, section 7 jeopardy standard, the Clark County short-term habitat conservation plan, *and section 9 prohibitions*) as the baseline for this analysis. As a result, critical habitat effects were those incremental impacts that would occur solely as a result of the critical habitat proposal above and beyond the effects of these other actions.") (emphasis added).

and common sense. *Compare* NMFS, Determination of Critical Habitat for the Snake River Chinook Salmon, 58 Fed. Reg. 68,543, 68,544 (1993) ("The economic and other impacts resulting from this critical habitat designation, over and above those arising from the listing of the species, are expected to be minimal."), *with* T. Kenworthy, *Sacrificing for Salmon*, Washington Post, Jan. 14, 1992 at A1 ("The impending sacrifices in behalf of the salmon represent another example of the sweeping power of the federal Endangered Species Act, which has seldom, if ever, been applied to a case involving so large an area or such a wide range of economic interests. The act already has put large swatches of Northwest timberland off-limits to logging to protect the northern spotted owl, and in the case of salmon it will affect the region's economic lifeline, the Columbia and its main tributary, the Snake."[28]

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[28] *See also*, NMFS, Designation of Critical Habitat for the Sacramento River Winter-Run Chinook Salmon, 58 Fed. Reg. 33,212, 33,218 (1993) ("The economic and other impacts resulting from this critical habitat designation, over and above those arising from the listing of the species under the ESA, are expected to be minimal . . . . The designation of critical habitat only duplicates and reinforces the substantive protection resulting from the listing; therefore, the economic and other impacts resulting from designation are expected to be minimal . . . ."); FWS, Designation of 6.4 Million Acres as Critical Habitat for the Mojave Population of the Desert Tortoise, 59 Fed. Reg. 5820, 5826 (1994) ("As a result of this analysis, the Service concluded that the economic impacts that would be incurred from critical habitat designation would not be significant to either the regional (seven-county) or national economy."); FWS, Designation of 6 Million Acres as Critical Habitat for the Northern Spotted Owl, 57 Fed. Reg. 1796, 1833 (1992) ("Based on the information discussed in this rule concerning public projects and private activities within critical habitat units, it is not clear whether significant economic impacts will result from the critical habitat designation."); FWS, Designation of Critical Habitat for the Concho Water Snake, 54 Fed. Reg. 27,377, 27,381 (1989) ("No significant economic or other impacts are expected from this designation of critical habitat for the Concho water snake."); FWS, Designation of Critical Habitat for the San Marcos Salamander, San Marcos Gambusia, Texas Wild Rice, and Fountain Darter, 45 Fed. Reg. 47,355, 47,362 (1980) ("The Service has prepared an impact analysis and believes that economic and

(footnote continues)

III. THE SERVICE HAS CONSCIOUSLY INVOKED AN EXPANSIVE DEFINITION OF "HARM" TO REGULATE HABITAT MODIFICATION IN ORDER TO AVOID THE CRITICAL HABITAT DESIGNATION PROCESS, WHICH IT PERCEIVES TO BE CUMBERSOME, TAXING, AND CONTROVERSIAL.

The Service designates critical habitat for approximately sixteen percent of the species listed as endangered or threatened.[29] This, despite the unmistakable emphasis Congress placed on designating critical habitat in the ESA. The question therefore arises: why is the Service so reluctant to utilize the critical habitat process?

Several explanations that might be proffered can be dismissed summarily. The notion that the economic impact analysis will overwhelm habitat protection considerations is implausible given the fact that the Service routinely dismisses economic impacts in practice. The notion that it is generally "not prudent" to designate critical habitat is so implausible as not even to pass

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(footnote continued)

other impacts of this action are not significant in the foreseeable future."); FWS, Designation of Critical Habitat for the Coachella Valley Fringe-Toed Lizard, 45 Fed. Reg. 63,812, 63,818 (1980) ("The Service has prepared an impact analysis and believes that economic and other impacts of this action are not significant in the foreseeable future."); FWS, Designation of Critical Habitat for the Least Bell's Vireo, 59 Fed. Reg. 4845, 4848 (1994) ("Numerous Federal, State, and local agencies have jurisdiction over the affected activities . . . . Although a number of agencies expressed concern that the designation of critical habitat would affect proposed or future projects and asked to have various project areas removed, the economic costs attributable to critical habitat for those projects are expected to be insignificant."); FWS, Designation of Critical Habitat for the Mount Graham Red Squirrel, 55 Fed. Reg. 425 (1990) (finding no significant economic or other impacts from designating critical habitat).

29. U.S. General Accounting Office, *Endangered Species Act: Types and Numbers of Implementing Actions* at 26 (May 1992).

the "red face" test.[30] The notion that critical habitat designation does not provide the Service with sufficient regulatory authority over the actions of nonfederal entities on private property, and that therefore the purposes of the Act can only be effectuated by reliance on an expansive definition of "harm," misperceives the potential scope of critical habitat designations and unlawfully expands the Service's authority under Section 9 of the Act.[31]

The Service's primary motivation for avoiding critical habitat designation is a political one. The general public operates under the assumption that the federal government possesses regulatory authority only over those areas that the Service has designated as critical habitat. This public perception, coupled with the requirement that critical habitat designations include

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30. "The proposition that the great majority of listed mammals, birds, reptiles, and amphibians are also so victimized by collectors that special protections for their habitat would not be prudent is largely a straw man for an institutional reluctance to go through the designation process, and to the designation itself." Houck at 305. *See also*, H.R. Rep. No. 1625, 95th Cong. 2d Sess. 17 (1978). ("The committee intends that in most situations the Secretary will, in fact, designate critical habitat at the same time that a species is listed as either endangered or threatened. It is only in rare circumstances where the specification of critical habitat concurrently with the listing would not be beneficial to the species.").

31. "The number of private projects and activities that could run into [§7] problems under the Act is coextensive with the regulatory and financial reach of the federal government. These private actions include, but are not limited to, every project that affects a navigable waterway, every water pollution point source, every housing project financed by the Department of Housing and Urban Development, every offshore oil lease, every deep sea mining operation, every major hydropower project, every interstate natural gas pipeline, every federally financed highway, and every significant coastal zone activity," Coggins and Russell at 1513-14 (citations omitted); *see also* 16 U.S.C. § 1533(b)(8) (any proposed or final regulation designating critical habitat "shall . . . include a description and evaluation of those activities (*whether public or private*) which . . . may adversely modify such habitat, or may be affected by such designation") (emphasis added).

detailed maps, often creates public opposition that the Service would prefer to avoid:

> [T]here is a genuine reluctance on the part of Fish and Wildlife to designate critical habitat based on other factors. Designation has been a source of vociferous public opposition in a number of cases. Fish and Wildlife is reluctant to arouse that sleeping dragon and is very much predisposed to find a reason of imprudence."

Interview with Michael J. Bean, Chairman, Wildlife Program, Environmental Defense Fund (Feb. 10, 1989), quoted in Salzman at 333-34 n.98.[32]

The Service has largely eschewed the critical habitat process for political reasons, choosing to regulate habitat modification through its expansive definition of "harm." In essence, the Service has deconstructed the Act, discarded the critical habitat process, along with its substantive and procedural elements, and seized on a statement of purpose concerning ecosystem conservation as a justification for making a federal crime out of modifying non-critical habitat.

In the process, the Service has subverted at least three key provisions of the Act: (1) that habitat regulation be tempered by

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[32] *See also* Interview with Donald Barry, Former Assistant Solicitor for Fish and Wildlife, Department of the Interior (Feb. 11, 1989), quoted in Salzman at 335-36 ("[critical habitat] maps galvanize opposition immediately. The local Chamber of Commerce goes into a siege mentality and hits the panic button. Most Members [of Congress] have run into an endangered species in their districts."); Interview with John Spinks, Former Director, Office of Endangered Species, U.S. Fish and Wildlife Service (March 15, 1989), quoted in Salzman at 336 ("[C]ritical habitat can lead to serious problems with local people and creates a very hostile opposition to the species. As soon as you draw a line on the map, they see it as the first step toward the feds condemning the land . . . . It may be paranoid, but it was a commonplace problem that led to us protecting species in a terribly hostile context. Time after time and place after place we faced local opposition and hostility.").

economic considerations; (2) that habitat subject to federal regulation meet strict biological criteria; and (3) that property owners, who face federal criminal prosecution for violating the Act, be given adequate *notice and opportunity to be heard* regarding potential federal regulation of private property under the Act. [33]

CONCLUSION

For all of the foregoing reasons, the Court should strike down the Service's expansive definition of "harm." Members of the Court have previously expressed the concern that "the reach of this regulation . . . is virtually limitless." *Hill* at 208 (Powell and Blackmun, JJ., dissenting).

It is time for the Court to act on that concern. For "while the Department of the Interior has been busy making as little as possible out of the mandatory provisions of section 7 [regarding critical habitat], it has allowed sections 9 and 10 to grow into something substantial, to the point that the two programs . . . have begun to merge into one large and largely-discretionary exercise."[34]

Through this large and discretionary exercise, the Service has undermined explicit Congressional directives and severely

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[33] *See* 16 U.S.C. § 1533(b)(8)(requiring description of private activities potentially subject to critical habitat regulation); 16 U.S.C. § 1533(b)(5)(E) (requiring public hearing on proposed regulation to designate critical habitat, if requested by any person).

[34] Houck at 352.

infringed on the due process rights of property owners. The decision below should be affirmed.

Respectfully submitted,

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BRUCE BABBITT, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,
v.
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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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The Organizations listed above respectfully file this brief as *amici curiae* in support of Respondents. Written consent has been obtained from counsel for petitioners and respondents for the filing of this brief pursuant to Supreme Court Rule 37. The letters reflecting consent have been filed with the clerk's office.

INTEREST OF *AMICI CURIAE*

Amici represent a broad cross section of public and private interests that have been adversely affected by the regulatory overreach of the U.S. Fish and Wildlife Service ("FWS") under the Endangered Species Act ("ESA" or the "Act"). The Chamber of Commerce of the United States of America ("Chamber") is the largest federation of business, trade, and professional organizations in the United States. The Chamber represents more than 215,000 companies, as well as several thousand trade and professional organizations, and state and local chambers of commerce. Ninety-six percent of the Chamber's members are businesses with fewer than 100 employees; seventy-one percent of the Chamber's members have fewer than ten employees. A significant aspect of the Chamber's activities involves the representation of the interests of its members in property rights and land use matters before the courts, the U.S. Congress, the executive branch, and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to protect those interests by participating in a variety of environmental and natural resource litigation efforts.

The Foundation for Environmental and Economic Progress, Inc. is a coalition of landowners that was founded to address federal environmental and economic policies affecting the use of land. The Foundation presently represents fourteen large entrepreneurial landowners and community developers with property in forty-four states. The ESA significantly affects Foundation members' use of their land.

The County of Kern is a political subdivision of the State of California. The Kern County Water Agency is also a political subdivison of the State of California, created for the purpose, *inter alia*, of providing water for the residents and lands throughout the County. The Agency supplies water to municipal and industrial consumers, as well as to over 300,000 acres of irrigable land, and maintains a variety of systems for storing and

delivering water to its customers. The Agency and the County's activities have been significantly affected by prohibitions on habitat modification under the ESA.

The National Association of Realtors® ("NAR") is a not-for-profit professional association comprised of approximately 750,000 persons engaged in all phases of the real estate business. NAR was created in 1908 to, *inter alia*, promote and encourage the highest and best use of land and protect and promote private ownership of real property. NAR includes among its members real estate brokers, managers, appraisers, counselors, and a variety of other participants in the residential, commercial, industrial, farm, and investment real estate markets. NAR members suffer adverse impacts when ESA prohibitions delay or otherwise affect development projects. The Oregon Association of Realtors® is a state affiliate of NAR. Its members have been particularly affected by federal land use controls arising out of the ESA.

The National Association of Industrial and Office Properties ("NAIOP") is a professional organization of 5,000 individuals engaged in owning, managing, and developing industrial and office buildings in the United States and internationally. Its members include not only the nation's leading commercial real estate developers, but also architects, brokers, master planners, engineers, property managers, banks, insurance companies, and other real estate financial groups. Development of industrial and office properties may be affected by regulation of habitat modification under the ESA.

Amici file this brief because of the broad impact the FWS regulation has had on a wide range of activities undertaken by individuals, businesses, and units of local government. *Amici* and their members have experienced and are aware of numerous situations in which the activities of nonfederal parties have been substantially affected by the prohibitions on land use arising from FWS's "harm" regulation.

The experience of a landowner in Texas is typical. Mrs. Margaret Rodgers of Lago Vista, Texas received a letter from FWS in 1991 informing her that clearing of vegetation on property of which she was part owner was destroying "prime habitat for the federally-listed endangered golden-cheeked warbler." The letter stated that destruction of habitat may constitute a take, which "could expose a violator to the criminal penalties provided for" under the Act. The letter also stated that the matter was being investigated by a Special Agent, suggesting that Mrs. Rodgers might be the subject of a criminal prosecution for clearing some vegetation. Little imagination is needed to envision the chilling effect of such a letter on ordinary activities that might affect habitat regardless of the presence of any golden-cheeked warblers.

The Kern County Water Agency had a similar experience. The Agency and the California Department of Water Resources ("DWR") proposed construction of a joint water project, called the "Kern Water Bank," on a 20,000-acre area southwest of Bakersfield, California. The proposal called for the conversion of 17,000 acres of agricultural land to a multi-use facility for groundwater overdraft correction, underground water storage for drought protection, community recreational use, and wildlife habitat.

After the agricultural land was fallowed to conserve water, which had the unintended effect of making the land suitable habitat for the blunt-nosed leopard lizard and the Tipton kangaroo rat, FWS, acting with and through the California Department of Fish and Game, began to demand dedication of thousands of acres for the protected species. The agencies asserted that modification of the newly fallowed land was a criminally prohibited "take" under the ESA. Negotiation of a Habitat Conservation Plan ("HCP") for the species began in 1991, and the most recent demands of the wildlife agencies are for the set-aside of three acres of habitat for every acre used by the project. DWR is now selling the project to the Kern County Water Agency, which is

reevaluating the project to determine if it continues to be economically feasible after more than three years of protracted and expensive negotiations.[1]

The Kern County Water Agency experienced further ESA-induced hardship when, in 1991, the Agency was confronted with the most serious emergency of its three decades of existence. Of the Agency's 1,154,000 acre-feet of agricultural waters entitlement from the California State Water Project, the Agency received zero acre-feet, *i.e.*, no water. Without water, over 100,000 acres of permanent crops, consisting of orchards and vineyards, were at risk of destruction. Annual crops planned for hundreds of thousands of acres of land were also threatened due to the drought. Destruction of the annual crops would terminate an income stream having a present value of billions of dollars. To avoid these results, the Agency's plan was to refurbish existing water wells and drill new water wells to extract water banked in the underground basin. However, the endangered blunt-nosed leopard lizard was discovered in the vicinity of the Agency's wells. The Department of Fish and Game informed DWR officials that the proposed refurbishing and drilling activities would disturb the ground around the well areas and, as such, could result in a "taking" of an endangered species under the ESA. Fearing criminal prosecution, the DWR delayed the project so that trapping of the lizard

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[1] The Water Agency's difficulty in negotiating an acceptable HCP, which is a prerequisite to obtaining an "incidental take" permit for otherwise lawful activities, demonstrates that the ESA's "escape valve" for property owners affected by Section 9 prohibitions is wholly inadequate. A recent study reported that up to three years is needed to develop and gain the FWS's approval of an HCP. U.S. General Accounting Office, GAO/RCED-95-16, *Endangered Species Act: Information on Species Protection on Nonfederal Lands* 9 (Dec. 1994). The experience of *amici* has been that this process can last longer than three years, with only a small likelihood that the process will actually yield a permit. The result is that for all but the most tenacious, the ESA makes it well nigh impossible for landowners to realize beneficial use of their land.

could determine its habitat. Fear of prosecution for perfectly reasonable behavior resulted in thousands of acre-feet of waters unpumped and thousands of acres of crops destroyed.

These examples show that the FWS interpretation being challenged has affected both public projects and private land use. Out of fear that they may be criminally prosecuted, public agencies and private property owners have been forced to forgo or delay projects at considerable expense, while untold acres have been effectively taken by the federal government through the land use authority FWS has assumed by virtue of its "harm" regulation.

STATEMENT OF THE CASE

Amici adopt the statement of the case contained in the Brief for Respondents.

SUMMARY OF ARGUMENT

This case concerns the validity of a federal regulation that has subjected a multitude of private and state and local government land use activities—from grading land to mowing grass—to federal control and exposed those engaging in such activities to potential criminal liability. Section 9 of the Endangered Species Act of 1973 makes it unlawful for any person to "take" endangered species of fish or wildlife. While "take" is defined in the statute to include "harm," the word "harm" is not defined in the ESA. Pursuant to the Act, FWS promulgated a regulation that defines "harm" in a manner that prohibits habitat modification by nonfederal actors, thereby making habitat modification a potentially criminal act. The question before this Court is whether the FWS regulation is consistent with Congress' intent in enacting Section 9.

In reviewing an agency interpretation of a statutory provision, the Court must give effect to Congress' intent when that intent is clearly expressed. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). There is no ambiguity in the

ESA; the language and structure of the Act establish that Congress intended to place the burdens associated with habitat protection only on federal actors. Thus, the FWS rule expanding "take" to prohibit habitat modification by private parties and other nonfederal entities is inconsistent with the clearly expressed intent of Congress and must be rejected.

Even if the Court were to determine that Congress did not express its intent on this issue, the rules of statutory construction appropriate to this case would lead to the same result. The regulation at issue expands potential criminal liability by making habitat modification a prohibited act. But administrative agencies, which enforce the laws, may not also make those laws. That way lies tyranny. Instead, under the separation of powers principles embodied in our Constitution, Congress, not the agencies or the courts, defines what behavior will be subject to criminal sanctions.

Moreover, FWS's rule criminalizes ordinary conduct (*e.g.*, mowing the lawn) without providing notice to citizens that such conduct may be deemed criminal. Due process demands more: crimes must be defined clearly. Where Congress' intention is not clear, this Court has employed the rule of lenity to construe ambiguous statutory provisions to limit potential criminal liability and avoid due process concerns. Thus, the agency's claims to deference must be rejected and the FWS regulation invalidated. This Court should not allow citizens to be "deferred" into prison.

ARGUMENT

I. THE LANGUAGE AND STRUCTURE OF THE ESA MAKE CLEAR THAT CONGRESS DID NOT INTEND FOR "TAKE" TO INCLUDE THE CONCEPT OF HABITAT MODIFICATION.

The question presented in this case is one of statutory interpretation. In such cases, the traditional tools of statutory construction—language, structure, and legislative history—are used to determine the meaning of the statute. *Crandon v. United States,* 494 U.S. 152, 158 (1990); *INS v. Cardoza-Fonseca,* 480 U.S. 421, 432 n.12 (1987). If the intent of Congress is clearly expressed, then a reviewing court must give effect to that intent. *Chevron,* 467 U.S. at 843 n.9.

As demonstrated below, the intent of Congress in using the words "take" and "harm" in the ESA is clear. The language and structure of the Act reflect an intent in Section 9 to proscribe traditional "takes"—intrusive acts targeted at specific individual members of protected species—and not to proscribe habitat modification, even where such modification may ultimately harm a species. Instead, habitat modification was addressed through Section 7, which regulates the conduct of federal actors (and through them, their licensees). The Court should give effect to Congress' intent by striking down FWS's regulatory definition of "harm" in 50 C.F.R. § 17.3 as inconsistent with the ESA.

A. The Language of the ESA Demonstrates That Habitat Modification Is Not a Prohibited Act Under Section 9.

" 'The starting point in every case involving construction of a statute is the language itself.' " *Landreth Timber Co. v. Landreth,* 471 U.S. 681, 685 (1985) (quoting *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 756 (1975) (Powell, J., concurring)). In enacting the ESA in 1973, Congress created a conservation program for endangered and threatened species of flora and

fauna and their habitats. *See* 16 U.S.C. §§ 1531-1544 (1994). The principal features of that conservation program as it relates to domestic species are found in three sections of the Act. Sections 5 and 7 are directed to federal agencies. Section 5 authorizes FWS to acquire habitat for endangered and threatened species. 16 U.S.C. § 1534. Section 7 requires federal agencies to exercise their authorities to promote the conservation of listed species and to ensure that their actions are not likely to jeopardize the continued existence of such species or to modify designated habitat. 16 U.S.C. § 1536. Section 9, on the other hand, applies to all persons. It prohibits individuals from engaging in a variety of activities, including trade in protected species. 16 U.S.C. § 1538. Section 9 also prohibits another class of acts pertaining to fish and wildlife species, which Congress summed up in the word 'take." 16 U.S.C. § 1538(a)(1)(B)-(C). In choosing that word, Congress invoked a venerable linguistic tradition.

For centuries, "take" had been used in English and American jurisprudence and common parlance to describe human efforts to subdue wild animals. The earliest references to the "taking" of wild creatures demonstrate, via context, that the word "take" signified direct, intrusive human activities targeted at particular animals that resulted in reducing those animals to possession. An English translation of the Justinian Code stated, " '[A]ll the animals which can be taken upon the earth, in the sea, or in the air,—that is to say, wild animals,—belong to those who take them, . . . because that which belongs to nobody is acquired by the natural law by the person who first possesses it.' " [2] Similarly, in his commentary on property, Blackstone wrote, "[B]y the law of nature every man, from the prince to the peasant, has an equal

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[2] *Geer v. Connecticut*, 161 U.S. 519, 523 (1896) (quoting *Digest of Justinian*, Dig. bk. 41, tit. 1, De Adquir. Rer. Dom.), *overruled in part by Hughes v. Oklahoma*, 441 U.S. 322 (1979).

right of pursuing, and taking to his own use, all such creatures as are *ferae naturae*." [3]

This understanding of "take" as meaning human activities directed at particular members of a species resulting in possession was incorporated into numerous early state fish and wildlife statutes. Those statutes augmented the word's meaning by associating the term "take" with a multitude of other terms related to hunting and fishing activities.[4] By the time the word passed into contemporary usage, many of the hunting and fishing terms had, in the context of fish and wildlife activities, become synonymous with "take." [5] It was natural, there-

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[3] 2 William Blackstone, *Commentaries* *411.

[4] *See, e.g.*, 1833 Md. Laws ch. 254, § 1 (prohibiting taking or catching of oysters " 'with a scoop or drag, or any other instrument than such tongs and rakes as are now in use' ") (*quoted in Smith v. Maryland*, 59 U.S. (18 How.) 71, 73 (1855)); 1886 Mass. Acts ch. 192, § 1 (prohibiting drawing, setting, stretching, or using of any drag net, set net or gill net, purse or sweep seine of any kind, for taking fish); 1920 La. Acts No. 135 (prohibiting taking of fur-bearing animals and alligators except during open season); 1923 Wash. Laws ch. 90, § 4 (prohibiting fishing or taking for sale or profit any salmon or other food or shellfish; defining "fishing" as "catching or taking of food fish with any appliance, gear or trap, floating or fixed, whatsoever"); 1926 La. Acts No. 103, §§ 4, 5, 13 (regulating taking and reduction to private ownership of shrimp); 1945 Cal. Stat. ch. 181 (persons who use, operate, or assist in using or operating any boat, net, trap, line, or other appliance to take fish, mollusks, or crustaceans for profit must procure a commercial fishing license); 1947 Mont. Laws ch. 224, § 5 ("No game birds or game or fur-bearing animals shall be killed, taken or hunted from an aeroplane, nor shall any aeroplane be used for the purpose of concentrating, pursuing, driving, rallying or stirring up any game or migratory birds, game or fur-bearing animals."); *see also Geer*, 161 U.S. at 527 ("The practice of the government of England from the earliest time to the present has put into execution the authority to control and regulate the taking of game.").

[5] As commonly defined today, "take" means "to get possession (as fish or game) by killing or capturing," *Webster's Third New International Dictionary* 2330 (Merriam 1981), or "[t]o get into one's possession by force, skill, or artifice, esp.: . . .[t]o kill, snare,

fore, for Congress to reach for the word "take" when wildlife conservation began to emerge as an issue of national concern and Congress was called on to craft protective legislation. Indeed, in its earliest effort to articulate its own set of prohibitions with respect to fish and wildlife—the Migratory Bird Treaty Act of 1918 ("MBTA")—Congress chose to prohibit activities that would "take" or "attempt to take" species. *See* 16 U.S.C. § 703 (1994).

When Congress enacts a law, its familiarity with the common meaning of the words it uses is presumed. *See Perrin v. United States,* 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."). Similarly, it is presumed that Congress is knowledgeable about existing law pertinent to the legislation it enacts. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). Therefore, as it began to fashion legislation to protect wild animals, Congress was undoubtedly aware of the ordinary meaning of "take" and its long-established use in state fish and wildlife statutes (*i.e.*, as "hunt," "fish," "capture," "kill," or other terms that convey the notion of intrusive human activity directed at particular members of fish or wildlife species and resulting in possession).[6]

Thus, in the MBTA, Congress made it unlawful for any person to "pursue, hunt, take, capture, kill, [or] attempt to take, capture, or kill" any migratory bird. 16 U.S.C. § 703. In using the term "take" as well as "attempt to take" in associaton with "pursue," "hunt," "capture," and "kill," Congress was using "take" in a manner consistent with its common meaning, *i.e.*, to

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or trap (fish or game, for example)." *American Heritage Dictionary* 1239 (2d ed. 1985).

[6] Given that Congress was moving into an area typically reserved to the states, *see, e.g.*, Michael J. Bean, *The Evolution of National Wildlife Law* 12-17 (rev. & exp. ed. 1983), congressional action would undoubtedly have been informed by state statutes reflecting the long state experience in this area.

describe an action that is direct, intrusive, and targeted at a particular animal or group of animals.[7]

In later statutes, Congress began to use the term "take" to cover the range of related activities it intended to prohibit, always defining the term in accordance with its original understanding of the core meaning of the word, *i.e.*, intrusive actions directed at particular animals that typically, although not necessarily, would result in possession. In the Bald and Golden Eagle Protection Act of 1940, Congress defined "take" as "pursue, shoot, shoot at, wound, kill, capture, trap, collect, or otherwise willfully molest or disturb." Pub. L. No. 76-567, § 4, 54 Stat. 251 (1940) (codified as amended at 16 U.S.C. § 668c (1994)). In the Fur Seal Act of 1966 and the Marine Mammal Protection Act of 1972, Congress defined "take" as "harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill." 16 U.S.C. §§ 1151(m), 1362(13) (1994). In these statutes, Congress used a variety of different terms to define "take," adding words such as "molest," "disturb," and "harass" to more traditional forms of take, such as "kill," "hunt," and "capture." However, the concepts embodied in all of the terms

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[7] FWS has defined "take" for purposes of the MBTA in a manner that reflects this common notion of the term. *See* 50 C.F.R. § 10.13 (1994) (defining "take" as "pursue, hunt, shoot, wound, kill, trap, capture or collect," or attempts to engage in such conduct). This same understanding of "take" is also reflected in several international agreements to which the United States became signatory in the decades following enactment of the MBTA. *See, e.g.*, Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere, Oct. 12, 1940, art. VIII, 56 Stat. 1354, 161 U.N.T.S. 193 (hunting, killing, capturing, or taking of species allowed only with permission of each country's government); International Convention for the Regulation of Whaling, Dec. 2, 1946, art. VIII, 62 Stat. 1716, 161 U.N.T.S. 72; Protocol to the International Whaling Convention, Nov. 19, 1956, art. I, 10 U.S.T. 952, 953 (regulating hunting, taking, killing, towing, holding on to, or scouting for whales by use of aircraft, helicopter, or ship); Agreement on the Conservation of Polar Bears, Nov. 15, 1973, art. I, 27 U.S.T. 3918, 3921 (defining "taking" as "hunting, killing, and capturing"). None of these treaties define "take" to include habitat modification.

chosen by Congress to define "take" in the fish and wildlife context were compatible with Congress' consistent use of the word over the course of fifty years; they all involve direct, intrusive interaction between a human and a specific animal.[8] Thus, while Congress added variations on a theme, it did not add wholly new and dissonant elements; rather, Congress consistently used the term "take" in a manner that accorded with its traditional and commonly understood meaning.

When Congress enacted the ESA in 1973, it again used the term "take" as the operative term to describe prohibited acts. In this case, Congress added another variant, "harm," to the "take" definition. Congress did not define "harm" or, indeed, any of the words that make up the ESA "take" definition. Certainly, in the absence of explicit congressional direction to the contrary, there is no evidence to suggest that Congress intended, through the addition of the word "harm," to depart completely from the core meaning of the word 'take" as Congress understood it. *See Dole v. United Steelworkers*, 494 U.S. 26, 36 (1990) (" '[W]ords grouped in a list should be given related meaning.' ") (citations omitted). In fact,

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[8] For instance, "harass" has been defined in the Marine Mammal Protection Act to involve this same core concept of direct, intrusive interaction directed at a particular animal or animals. *See United States v. Hayashi*, 22 F.3d 859, 864 (9th Cir. 1993) (to constitute a "take," "harassment" must entail direct intrusion that is similar in significance to killing, capturing, or hunting; the harassment must be a serious and sustained diversion of a marine mammal from its natural routine); *see also* 46 Fed. Reg. 29,490, 29,491 (1981) (Interior Department Office of the Solicitor opinion that "harass" represents a form of conduct that is "directed against and likely to injure or kill *individual* wildlife"). There is evidence that Congress understood the term in a similar vein in the ESA, as demonstrated by the committee statement that birdwatching could constitute harassment under certain circumstances. *See* H.R. Rep. No. 412, 93d Cong., 1st Sess. 11 (1973). Such an activity involves an intrusive interaction with a bird that would affect the bird in a very direct fashion. In normal usage, "molest" and "disturb" embody the same notion.

as discussed below, the evidence is very much to the contrary.[9]

Construing the word "harm" to mean "modify habitat," as the FWS has done, *see* 50 C.F.R. § 17.3, would result in just such a departure in the meaning of "take." Habitat modification is logically inconsistent with Congress' overarching choice of the word "take" as the focal point of Section 9 prohibited acts. Habitat modification activities such as cutting a tree or mowing a field are not targeted at individual members of fish or wildlife species. Nor do they, as a *necessary* component, involve direct, intrusive interactions with particular individuals. FWS's interpretation, however, sweeps broadly to include within the ambit of "take" a wide range of activities that would "harm" endangered animals only indirectly by, for instance, prompting an animal to feed in a different area. Such activities do not involve direct, intrusive interaction between a human and an animal. Thus, habitat modification differs in kind from all other activities previously defined as "take." It strains credulity to believe that Congress—knowing full well the common meaning of "take" —would have chosen the term "harm" to make a quantum leap in the traditional meaning of "take," particularly when "harm" can easily be read in a manner fully consistent with the accepted meaning of "take."

In the face of the long history of the term "take," the government makes much of a Senate committee report on

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[9] *See infra* Part I.B. The legislative history provides further evidence that Congress intended to exclude habitat modification from the definition of "take." Senate Bill No. 1983, which, as amended, ultimately became the ESA, originally specified "destruction, modification, or curtailment of habitat or range" as part of the definition of "take." *See* S. 1983, 93d Cong., 1st Sess. § 3(6)(A) (1973). This provision was deleted from the final act during committee markups. "Such deletions generally militate against a conclusion that Congress intended a result that it expressly declined to enact." 46 Fed. Reg. at 29,491 (citing *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974)) (Interior Department Office of the Solicitor memorandum opinion on the FWS's "harm" regulation).

an early version of the ESA that stated, " '[T]ake' is defined . . . in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." S. Rep. No. 307, 93d Cong., 1st Sess. 7 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2995; *see* Brief for Petitioners at 16, 27-28; Petition for Writ of Certiorari at 15-16. That statement is unremarkable, however. Congress clearly intended to incorporate many different types of efforts to subdue species into the ESA "take" definition. As illustrated by the pre-ESA fish and wildlife statutes, the "conceivable ways" of reducing members of a species to human possession are extremely diverse. They include not only such common actions as shooting a creature with a gun or an arrow or catching a fish with hook and line, but also such activities as netting, baiting, luring, clubbing, poaching, poisoning, spraying, raking, knifing, spearing, scooping, dragging, purse-seining, harpooning, rounding up, and harvesting.[10] But they do not include habitat modification.

FWS's inclusion of habitat modification in the definition of "harm," and thus in the definition of "take," would distort beyond recognition the latter word's long-established meaning. In light of the fact that Congress chose *not* to add the words "modify habitat" to the ESA definition, it is clear that Congress did not intend an expansive interpretation that is at such variance with contemporaneous understandings of the term "take."[11] *See Colautti v. Franklin*, 439 U.S. 379, 392 n.10 (1979) ("As a rule, '[a] definition which declares what a term "means" . . . ex-

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[10] *See, e.g., supra* notes 4, 7.

[11] The same Senate report that described Congress' use of the term "take" to include all "conceivable ways" an animal can be taken also stated that an "accelerated land acquisition program is essential" because "[o]ften, protection of habitat is the only means of protecting endangered animals which occur on non-public lands." S. Rep. No. 307 at 4, *reprinted in* 1973 U.S.C.C.A.N. at 2992. This confirms that the 1973 Congress perceived "take" and habitat destruction to address conceptually different problems.

cludes any meaning that is not stated.' ") (quoting 2A C. Dallas Sands, Statutes and Statutory Construction § 47.07 (4th ed. Supp. 1978).

B. The Structure of the ESA Demonstrates That Habitat Modification Is Not a Prohibited Act Under Section 9.

"In ascertaining the plain meaning of [a] statute, [a] court must look to . . . the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). The structure of the ESA provides conclusive evidence that Congress intended for "take" to cover a specific set of concepts that does not reach habitat modification.

In enacting the ESA, Congress was aware of the importance of protecting habitat for endangered species. To address this issue and others, Congress designed a multifaceted species protection program that places distinctly different responsibilities on federal and nonfederal actors. Under Section 7(a)(2), federal agencies must ensure that their actions will not be likely to adversely modify critical habitat.[12] 16 U.S.C. § 1536(a)(2). In contrast, Section 9, which applies to all parties in all circumstances, does not forbid the modification of habitat, critical or otherwise, but instead prohibits the "taking" of fish and wildlife species. 16 U.S.C. § 1538(a)(1). In sum, the only statutory provision that specifically addresses habitat issues relates explicitly to federal actors, while the statutory provision that reaches nonfederal parties is silent as to habitat modification.

FWS's definition of "harm" threatens to undermine this carefully considered structure. " '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally

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[12] Section 7(a)(2) may affect nonfederal actors in certain limited circumstances where those actors are federally funded or permitted, but the affirmative obligation to avoid modifying critical habitat remains assigned to the federal agency overseeing the private action.

presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). If Congress had wished to regulate habitat modification activities by federal and nonfederal parties, it could easily have done so by inserting such a prohibition in the Section 9 definition of "take" or elsewhere. However, as the Court has said, "The short answer is that Congress did not write the statute that way." *United States v. Naftalin*, 441 U.S. 768, 773 (1979). Instead, Congress explicitly incorporated habitat modification only in the protections provided by Section 7(a)(2). It is clear, then, that Congress did not mention habitat modification in the context of regulating nonfederal activities because Congress did not intend, under Section 9 of the ESA, to enact a broad prohibition on habitat modification.

Furthermore, the FWS interpretation would render Section 5 and the critical habitat provision of Section 7(a)(2) of little moment. The federal government has scant incentive to purchase important habitats if it can achieve the same result (protection of habitat and thus species), cost free, under Section 9.[13] Moreover, there would be no need to invoke Section 7(a)(2)'s prohibition against adversely modifying critical habitat if such modification were already prohibited under Section 9. The effect is essentially to read out of the statute the only provision in which Congress specifically precluded habitat modification by endorsing an expansive interpretation of a provision that is silent as to habitat modification. Statutory terms should be interpreted so that no part of the statute will be ren-

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[13] This Court has long been concerned about agencies' attempts to achieve their goals by placing burdens on selected individuals rather than spreading the cost of achieving public goals to ensure that the public bears the burden. *See, e.g., Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) ("[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.").

dered superfluous by another part of the same statute. *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988). Thus, to preserve Congress' intent in enacting Sections 5 and 7(a)(2), the "harm" regulation should be invalidated.

C. Incantations of Broad Statutory Purposes Cannot Justify an Administrative Interpretation That Violates Congressional Intent.

The government claims that FWS's reading of the statute is justified because it advances a goal of the ESA—protection of endangered species' habitats. Brief for Petitioners at 17. However, appeals to the broad purposes of the Act are misplaced, for they ignore the compromises that underlie any congressional scheme:

> But no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law. Where, as here, "the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . '[there is no occasion] to examine the additional considerations of "policy" . . . that may have influenced the lawmakers in their formulation of the statute.' "

Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) (per curiam) (quoting *Aaron v. SEC*, 446 U.S. 680, 695 (1980)).

Indeed, federal environmental statutes uniformly cite protection of the environment as a goal. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1251(a) (1994) (goal of Act is to restore and maintain physical, chemical, and biological integrity of nation's water). However, each statute is drafted to reflect a balance between the protective goal and the societal costs associated with meeting that goal.

Thus, the Clean Water Act allows the discharge of regulated amounts of pollutants; the Resource Conservation and Recovery Act allows waste generation and disposal as long as certain waste management procedures are followed; and the Toxic Substances Control Act permits the manufacture of toxic substances as long as the amounts manufactured are recorded and reported.

When it considered how to treat habitat modification in the ESA, Congress affirmatively balanced the competing interests of protecting species' habitats and limiting the economic costs associated with such protection. While certain burdens are imposed on nonfederal parties with respect to trade in endangered species and hunting, collecting, and other forms of taking species, Congress placed the burden of habitat protection on federal parties. The government attempts to upset the balance struck by Congress in the ESA by making policy through the regulatory process and justifying it through a misleading invocation of congressional goals.

If FWS and its *amici* believe that it would be advisable to expand the scope of activities subject to regulation under Section 9, the only way to effectuate such a change is to ask Congress to amend the ESA. As the Court has stated:

> The statute may be imperfect, but the [agency] has no power to correct flaws that it perceives in the statute it is empowered to administer. Its rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute.

Board of Governors v. Dimension Fin. Corp., 474 U.S. 361, 374 (1986). Policy changes should be reserved for congressional action, and the FWS restricted to its constitutional role: implementing the ESA as enacted by Congress.

II. BECAUSE CONSTITUTIONAL PRINCIPLES REQUIRE THAT CONGRESS DEFINE CRIMES SO AS TO PUT AFFECTED PARTIES ON NOTICE, ANY AMBIGUITY IN THE STATUTE MUST BE RESOLVED AGAINST AN FWS INTERPRETATION THAT EXPANDS CRIMINAL LIABILITY.

The ESA is clear. The statute prohibits habitat modification by federal actors but not by private or other non-federal actors. Thus, under well-settled principles of statutory construction, the Court should give effect to congressional intent and set aside the FWS regulation.

Even if the Court were to find the statute ambiguous on this point, it should nonetheless reject the FWS interpretation. The ESA is a criminal statute and the FWS regulation criminalizes ordinary conduct without providing notice to those who are subject to its prohibitions. In this circumstance, constitutional principles of separation of powers and due process dictate that any ambiguity in the definition of "take" should be resolved in a manner that limits potential criminal liability.

A. In Interpreting Ambiguous Statutory Provisions, the Weight Accorded to Agency Views Will Depend on a Number of Factors.

Ambiguous statutory provisions that are administered by an expert agency and that have civil and criminal applications raise a unique problem for reviewing courts. An agency that is delegated rulemaking authority by Congress plays an important interpretive role in certain situations. Where a particular application of a technical statutory provision has not been considered by Congress, agencies with expertise in the subject matter of the statute must interpret the provision in order to fill the gap and implement the law's civil provisions. Citing the importance of that role, the Court in *Chevron* deferred to an expert agency's reasonable interpretation of a technical statutory term that Congress had left undefined. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984).

However, the interpretive authority of administrative agencies is subject to important constraints that have their roots in the foundation of our system of government. The constitutional separation of powers principle reflects, in large part, the determination that no single governmental body should have the power to define a crime that it also prosecutes. When a court reviews a criminal statute, it seeks to ensure that this separation is maintained. Further, due process requires that citizens be put on notice as to what constitutes criminal conduct. Thus, if a statute that imposes criminal sanctions is unclear, the statute must be interpreted narrowly to minimize the possibility that citizens can be convicted of a crime without being aware that their conduct risks criminal sanctions.

Accordingly, in reviewing an ambiguous statutory provision that has been interpreted by an administrative agency, a court must consider a number of factors to determine how to resolve the ambiguity. The court must consider whether the administration of the statute in question is delegated to a particular agency that may have developed expertise in the area and whether the issue to be resolved is one that requires the agency's expertise. However, the court must also determine whether the statute in question has criminal applications that implicate principles such as separation of powers and due process. In such circumstances, deferring to an agency interpretation would upset the balance of power among the three branches of government and, therefore, would be inappropriate.

B. The Principle of Separation of Powers Requires That Congress, Not Administative Agencies, Define Crimes.

When a court is faced with ambiguity in a statute the violation of which may cost an individual his liberty, the court's duty in interpreting the statute is clear: the court

must look to Congress, not an administrative agency, to define the scope of criminal conduct. *See United States v. Kozminski*, 487 U.S. 931, 949 (1988) (rejecting the federal government's statutory interpretation because it "would delegate to prosecutors and juries the inherently legislative task of determining what type of coercive activities are so morally reprehensible that they should be punished as crimes"). This is particularly true where the agency seeks to interpret the statute in a manner that expands the scope of criminal liability. *See id.* at 949-50.

Such is the case here. The ESA provides criminal sanctions, including imprisonment, for violations of the Act or its implementing regulations. 16 U.S.C. § 1540 (b)(1). Thus, it is a criminal statute: "we know of no other basis for determining when the essential nature of a statute is 'criminal.'" *United States v. Thompson/ Center Arms Co.*, 112 S. Ct. 2102, 2110 n.10 (1992); *see also Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 30 F.3d 190, 194 (D.C. Cir. 1994) (Silberman, J., dissenting from denial of rehearing *en banc*). Moreover, the FWS rule has the effect of expanding the universe of activities to which these criminal sanctions apply—that is, it criminalizes activities that traditionally have been considered "takings" (*e.g.*, killing or injuring an individual member of a species) but also wholly benign activities that have never been considered "takings" (*e.g.*, removing sediment from a drainage ditch).

This fundamental principle—that the Court must interpret a criminal statute by determining the views of Congress, not an agency—rests on the separation of powers that is the foundation of our system of government. *See Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) ("[C]riminal statute[s are] not administered by any agency but by the courts."). "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise,

lest the same monarch or senate should enact tyrannical laws and execute them in a tyrannical maner." Baron de Montesquieu, *The Spirit of the Laws* 151-52 (Thomas Nugent trans., 1966) (1949). The Framers shared this concern, embedding the concept of separation of powers in the constitutional mandate that "[a]ll legislative powers . . . shall be vested in a Congress of the United States" and "executive power . . . in a President." U.S. Const. art. I, § 1; *id.* art. III, § 1; *see also United States v. Robel*, 389 U.S. 258, 277-78 (1967) (Brennan, J., concurring) (delegation of power to Secretary of Defense to define criminal liability "not a constitutionally acceptable substitute for Congress' judgment").

The FWS rule runs afoul of the separation of powers principle because the same agency is defining the crime and enforcing it. By interpreting Section 9 of the ESA to encompass the prohibition against habitat modification by nonfederal parties, the FWS has not merely formulated civil policy, it has defined the meaning of words in a manner that can be used to deny citizens their freedom. The defining characteristic of that interpretation is that it extends the Section 9 prohibition on "take" to a category of activities that is not explicitly mentioned in the statute and that would not be subject to the prohibition absent the FWS regulation. Adoption of the FWS interpretation would therefore result in FWS defining the scope of criminal liability. The Court should not acquiesce to FWS's usurpation of the authority that the Constitution leaves solely to Congress. Instead, the Court must determine, independent of the FWS interpretation, what Congress intended to define as a crime.

C. In the Face of Ambiguity in a Criminal Statute, the Court Must Apply the Rule of Lenity and Adopt a Narrow Interpretation.

If Congress has not clearly stated what activities are prohibited, the Court must determine some means for resolving the ambiguity without relying impermissibly on

the agency interpretation. The appropriate method for resolving ambiguity in criminal statutes derives from the guarantee of due process. Ordinary notions of due process require that citizens have notice that the conduct they are contemplating has been criminally prohibited. *Ladner v. United States*, 358 U.S. 169, 178 (1958). The courts give life to this fundamental principle by requiring Congress to be explicit about what it considers a crime. When Congress is not explicit, courts construe ambiguous provisions to limit potential criminal liability:

> [W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.

Ladner, 358 U.S. at 177-78 (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952)); *see also Kozminski*, 487 U.S. at 952 (statute interpreted narrowly to prevent "the arbitrariness and unfairness of a legal system in which the judges would develop standards for imposing criminal punishment on a case-by-case basis"); *Thompson*, 112 S. Ct. at 2113 (Stevens, J., dissenting) (rule of lenity would be appropriate in criminal case in which the defendant did not have adequate notice of the government's interpretation of an ambiguous statute).

To ensure that individuals have adequate notice of what acts may be criminal, this Court has adopted the rule of lenity when faced with ambiguous statutory provisions. Under the rule of lenity, if the Court is "left with an ambiguous statute" after " 'seiz[ing] everything from which aid can be derived,' " the provision at issue will be read in the manner that limits criminal liability. *United States v. Bass*, 404 U.S. 336, 347 (1971) (quoting *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805)).

This Court recently applied the rule of lenity in the civil context to reject an agency interpretation of a statute the agency had responsibility for administering. *See United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102 (1992). The controversy before the Court was predicated on a challenge to the Bureau of Alcohol, Tobacco and Firearms' ("ATF") interpretation of the word "firearms," defined in the National Firearms Act ("NFA") as rifles with barrels less than sixteen inches long, or "short-barreled rifles." ATF notified the Thompson/Center Arms Company that the product it made, an unassembled kit containing all the parts needed to make either a short- or a long-barreled rifle, was taxable as a "firearm" within the meaning of the NFA. The company sued to recover the tax it paid, arguing that its product was not taxable because assembly was required to create a short-barreled rifle and because an alternate choice by the purchaser, attaching a longer barrel, would make the product a long-barreled rifle, which is not taxable under the NFA.

The Court found that "[n]either the statute's language nor its structure provides any definitive guidance" as to whether Congress intended the term "firearm" to include an unassembled rifle. *Thompson*, 112 S. Ct. at 2107. Observing that the NFA is a strict liability statute that can result in criminal violations without a finding of willfulness, the Court applied the rule of lenity to reject the broader definition proffered by the government and concluded that a narrow construction of the term "firearm" was "proper." *Id.* at 2109.

As in *Thompson*, the FWS regulation interprets a statute to expand criminal liability in a situation where no willfulness is required to establish liability. *See* 16 U.S.C. § 1540(b). Instead, the ESA imposes criminal liability for "knowing" violations and, thus, does "not require the government to show that [the defendant] knew his conduct was illegal." *United States v. Nguyen*, 916 F.2d 1016, 1018 (5th Cir. 1990) (criminal con-

viction under Section 9 of the ESA for possession of a threatened Loggerhead sea turtle). As a result, under the FWS interpretation of "take," a citizen could be convicted of a crime if she knew that she had modified her land even if she did not know that the land was habitat or potential habitat for threatened or endangered species.[14]

Indeed, the FWS interpretation makes "knowing" but unintentional takes common occurrences. Habitats are often modified by everyday behavior, such as building a home, digging a drainage ditch, mowing a lawn, or trimming a hedge. Frequently, persons conducting these activities are individuals, not large businesses with legions of advisers.

Thus, application of the rule of lenity is necessary here because the FWS interpretation expands potential criminal liability by increasing the number of activities that are subject to the Section 9 prohibitions yet fails to notify citizens that their conduct may be criminal. *See Crandon v. United States,* 494 U.S. 152, 158 (1990); *see also Thompson,* 112 S. Ct. at 2110; *Liparota v. United States,* 471 U.S. 419, 427 (1985); *United States v. Bass,* 404 U.S. 336, 347-48 (1971); *United States v. Fisher,* 6 U.S. (2 Cranch) 358, 386 (1805). In cases such as this, where ordinary citizens have no notice that their behavior may be criminal, applying the rule of lenity is necessary to protect "the bedrock principle that in a free country citizens who

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[14] In some cases, the Court has prevented normal conduct from being criminally prosecuted pursuant to a statutory "knowing" standard by presumptively interpreting the statute to require scienter for each element of the crime. *See, e.g., United States v. X-Citement Video, Inc.,* 115 S. Ct. 464, 469 (1994) (interpreting the Protection of Children Against Exploitation Act, which prohibits "knowingly" receiving child pornography, as requiring that the defendant know that he is receiving sexually explicit material in order to prevent ordinary conduct from being criminalized). However, the same presumption has not been applied to the ESA's criminal provisions. *See Nguyen,* 916 F.2d at 1018.

are potentially subject to criminal sanctions should have clear notice of the behavior that may cause sanctions to be visited upon them." *United States v. McGoff*, 831 F.2d 1071, 1077 (D.C. Cir. 1987).[15]

In short, the FWS interpretation should be rejected under the rule of lenity.

D. FWS's Claims to Deference Must Be Rejected.

Ignoring the criminal application of the "harm" regulation, the government's brief assumes that FWS's interpretation of Section 9 is entitled to deference under *Chevron*. The gist of the government's argument is that, under *Chevron*, if the Court finds the statutory provision at issue ambiguous, then the FWS interpretation of the provision should be upheld as long as that interpretation is based on a "permissible construction" of Section 9. This argument is unavailing because *Chevron* does not apply under the circumstances of this case.

Chevron involved a challenge by several environmental groups to the Environmental Protection Agency's ("EPA") interpretation of the phrase "stationary source" in the Clean Air Act ("CAA"). Plaintiffs argued that "stationary source" was intended to refer to single emissions points and, therefore, an EPA regulation that allowed permit conditions to be based on the "bubbling" of several emissions points at a facility was impermissible under the CAA.

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[15] It makes no difference that the statute is not being challenged before this Court in the criminal context. The Court in *Thompson* applied the rule of lenity to the civil application of a statutory provision that potentially expanded criminal liability, illustrating that the mere potential that an ambiguous statutory provision will be applied to impose criminal liability requires that the provision be interpreted narrowly. Here, the Court is similarly faced with a statute that can be used to impose criminal penalties without a finding of willfulness. *See* 16 U.S.C. § 1540(b). Accordingly, it is appropriate to apply the rule of lenity even though the ESA also has civil applications.

In reviewing the challenge, the Court determined that Congress had never considered the narrow issue before the Court, but instead had left the term "stationary source" undefined and ambiguous rather than making a decision as to the proper balance to be struck between competing economic and environmental interests. *Chevron,* 467 U.S. at 862. Reasoning that when Congress leaves a technical statutory provision undefined, it must in effect be delegating the policy judgment to the agency charged with administering the statute, the Court deferred to EPA's interpretation of the statutory provision. The Court noted that EPA, unlike the Court, is part of the "political branch of Government," and it is therefore appropriate for the agency to resolve "the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities." *Id.* at 865-66. Thus, the Court determined that, as the expert in the field, EPA should be permitted to fill in the "gap left open by Congress." *Id.* at 866.

Chevron teaches that an agency's interpretation of a statute it administers may be entitled to deference, particularly when the issue before the Court has not been considered by Congress and is uniquely within the expertise of the Agency.[16] *See Chevron,* 467 U.S. at 859;

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[16] Unlike the complex, technical provision at issue in *Chevron,* the provision at issue in this case consists of words that have commonly understood meanings and, thus, require no technical expertise. The Court in *Chevron* found that the definition of "stationary source" was predicated on a complicated array of factors, only some of which were defined in the statute. *Chevron,* 467 U.S. at 864 n.38. Accordingly, the Court found that the term "stationary source" was technical and should be deciphered by EPA rather than the Court, because EPA was expert in the CAA.

Conversely, when Congress enacts a law containing words that have common meanings, it is inappropriate to conclude that Congress intended to delegate the responsibility for interpreting such words to the implementing agency. *Aurora Packing Co. v. NLRB,* 904 F.2d 73, 75 (D.C. Cir. 1990) (court declined to defer to NLRB's

Aluminum Co. v. Central Lincoln Peoples' Util. Dist., 467 U.S. 380, 389-90 (1984). However, administrative agencies have no authority to interpret criminal liability.[17] *See Kozminski*, 487 U.S. at 949. It is Congress, not administrative agencies, that must define the extent of criminal liability, and it is the role of the courts to ensure that this is the case. *Crandon*, 494 U.S. at 177 (Scalia, J., concurring). Thus, in resolving any ambiguities in the ESA, resort to administrative interpretations by FWS are inappropriate, especially where the interpretation dramatically expands the range of prohibited conduct.

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interpretation of the word "employee" because the word had an established common law meaning, and the NLRB had no expertise in common law). This Court has recognized that words of common usage and meaning are to be analyzed differently from technical words: "In the search for statutory meaning, we give nontechnical words and phrases their ordinary meaning." *Smith v. United States*, 113 S. Ct. 2050, 2061 (1993) (Scalia, J., dissenting); *see also Chapman v. United States*, 500 U.S. 453, 462 (1991); *Perrin v. United States*, 444 U.S. 37, 42 (1979). As noted above, the words "take" and "harm" have understood meanings when used in connection with endangered species. Interpreting these terms does not require technical knowledge about endangered species, but only the ability to interpret simple words in the English language. Accordingly, the statutory provision at issue here should "be read with the saving grace of common sense with which other enactments, not cast in technical language, are to be read." *Bell v. United States*, 349 U.S. 81, 83 (1955).

[17] Although the CAA has criminal provisions, the *Chevron* Court did not address the rule of lenity. A review of the briefs in *Chevron* indicates that the issue was simply not before the Court. In any event, the outcome in *Chevron* would have been the same. Unlike the FWS interpretation in this case, the EPA definition of "stationary source" did not expand potential criminal liability. Under EPA's bubble concept, several emissions points can be regulated as a single stationary source, thereby reducing the number of emissions violations that can lead to criminal liability under the CAA. Accordingly, the separation of powers and due process concerns present in this case were not of concern in *Chevron*.

In this case, acceding to FWS demands for deference under *Chevron* would have the effect of allowing an administrative agency free rein in determining what actions may result in criminal sanctions. Deference is inappropriate in such circumstances. Accordingly, if the Court finds that Congress did not have an intent with respect to the meaning of the term "take," the Court should apply the rule of lenity, resolving any ambiguity to limit potential criminal liability. Courts should not hand agencies the keys to the jailhouse door.

CONCLUSION

For the forgoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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BRUCE BABBITT, SECRETARY OF THE INTERIOR, et al.,

Petitioners,

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The Institute for Justice is a nonprofit, public interest legal center committed to defending essential foundations of a free society and securing greater protection for individual liberty. Central to the mission of the Institute for Justice is strengthening the ability of individuals to control and transfer property and advancing the belief that property rights are intricately connected with other civil rights.

Although the question in the case before this Court specifically involves a question of proper statutory interpretation, the case addresses several larger issues involving private property rights, the proper role of administrative decision-making in a free society, and the inevitable consequences of permitting government officials to be insulated from the costs of an expansive interpretation of a statute. The Institute's brief is co-authored with Professor Richard Epstein, one of the nation's leading authorities on property law.

The Institute for Justice has obtained the consent of the parties to the filing of this brief and letters of consent have been filed with the Clerk.

STATEMENT OF FACTS AND SUMMARY OF ARGUMENT

This case concerns a single question of statutory construction that raises vital questions of both constitutional design and public policy. The Endangered Species Act (ESA), first passed in 1973, represents a vast and highly integrated effort by Congress to prevent the unwarranted destruction of various species of fish, wildlife, and plants found to be threatened with extinction. The federal powers under the ESA take two forms. First, the ESA contains a prohibition against the taking of an endangered species, where the term "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct." Endangered Species Act § 3(19), 16 U.S.C. § 1532(19). To implement this provision, the Secretary has issued regulations that construe the term "harm" to include any "significant habitat modification or degradation where it actually

kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3. Second, and beyond the ESA's power to prevent harm, the Secretary has a separate and distinct power of habitat acquisition "by purchase, donation, or otherwise" to "conserve fish, wildlife, and plants." Section 5(a); 16 U.S.C. § 1534(a).

The sole question of law in this case is whether the regulations on habitat modification fall within the power of the Secretary to prevent harm to endangered species under the ESA. The question is not simply an arid exercise of statutory construction. It raises profound questions about the security of property rights and the limits on government power in a free society. To see the importance of this question, one must begin not with the details of the ESA, but with an examination of the consequences that follow when the term "harm" is construed so broadly as to embrace any human action that alters habitat and leaves an endangered species worse off than it otherwise might have been. Under the challenged definition, any human act of productive labor can be regarded as causing harm because any such action could modify some habitat of some endangered species. Resources are finite and any use of them for human advancement could be interpreted as having some negative consequences on the habitat of some species protected by the ESA. All forms of human activity, even those which are necessary for human survival, can be interdicted under the Act if the Secretary's regulation is allowed to give the ESA such broad interpretation.

A statute that attaches extensive criminal penalties to harm to endangered species, *see* 16 U.S.C. § 1540, should construe the term "harm" as it is normally construed under the criminal law: as an act which implies the threat or use of force against a member of the species protected under the Act, a meaning which is congruent with all the other terms contained within the statutory definition of "take." There is no reason why that term should be construed, especially by administrative fiat, to punish the same productive activities that the criminal law, under its central principle of harm prevention, protects from the aggression of others.

Not only does the Secretary's regulation turn the statute and the criminal law on its head, but it also is destructive of the very result – the preservation of habitat – that it seeks to achieve. One obvious unwanted consequence of this misguided interpretation is that it encourages individuals to destroy habitat at great rapidity at the first hint that some species may be placed on a protected list. What other consequence can be expected when a perceived public good becomes a local disaster to the hapless owner on whose property the habitat is located? Worse still, there is no way that any owner of land can obtain security from the United States by repurchasing from the government the original bundle of property rights that he enjoyed prior to regulation. A contractual settlement with the United States is at best a temporary palliative. The next day may bring with it the designation of another species' habitat so that the cycle of compromise and surrender will continue until the use of vast tracts of land can be controlled by administrative designation. Correctly construed, the harm principle is an essential element of a well-ordered society. No administrative regulation should invoke the criminal law to subvert this vital principle.

This distortion of the classical harm principle is entirely unnecessary. The acquisition programs explicitly authorized under the ESA provide all the necessary means for the preservation of habitat. By placing the important task of habitat designation on-budget, the total level of social resources committed to the program can be determined by explicit democratic evaluation and not by covert administrative action. Yet by the same token, antisocial private actions remain subject to affirmative sanction both civil and criminal, since the ESA clearly blocks all acts of aggression that "take" endangered species.

These two halves of the ESA, then, work together in perfect harmony as a matter of social policy and of statutory construction, and the resulting synthesis conforms completely to the basic principles of constitutional jurisprudence as set out in *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992). Under the ESA, as in *Lucas*, the background principles of tort and nuisance, long developed at common

law, set the line between those actions that the government may restrict without compensation and those which require compensation. The imaginative biologist can find some habitat destruction in every productive use of land, even those that do not come within a country mile of a common law nuisance. Without any explicit authorization from Congress, the Secretary cannot designate by a stroke of the pen vast expanses of private property as critical habitat, which their owners can use only on pain of criminal sanctions. When the United States wishes to prohibit ordinary construction and use of a home, farming, mining, and recreational activities, it should buy the needed habitat for endangered species, just as it must buy land for the national park system. Congress could have hardly intended otherwise.

The structure and constitutional setting of the ESA make it clear that the Secretary may prevent habitat modification only on payment of compensation. If Congress itself were to amend the ESA to authorize the Secretary to designate private lands as protected habitat without payment of just compensation, that amendment would precipitate a major constitutional challenge as a physical or regulatory taking under the Fifth Amendment. Absent any specific authorization, the Secretary cannot redesign the fundamental structure of the ESA by administrative regulations that explicitly choke off all possibility of compensation without Congressional authorization. Read in its entirety, the ESA clearly does not authorize the taking of habitat without compensation; nor, if ambiguity is created where none should be found, should there be any deference to agency determinations under the *Chevron* doctrine. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Not only does this aggressive interpretation of the ESA trench on traditional private property rights, but it also performs an additional disservice by effectively preventing sensible state regulation of private property in those core areas of the police power: matters of the safety and health of its people. No regulation could declare that black is white, or up is down. And none should be allowed to treat the ordinary and productive use of property as a criminal act. The power to designate should not be

transformed by administrative fiat into the power to rule with impunity.

ARGUMENT

I. VIEWED AS A WHOLE, THE ENDANGERED SPECIES ACT PRECLUDES ANY AGENCY DETERMINATION THAT MODIFICATION OF HABITAT CONSTITUTES "HARM" THAT MAY BE ENJOINED UNDER THE ACT.

A. "Harm" Within The Statutory Definition Encompasses Only Those Actions That Attack Or Threaten A Listed Species, But Does Not Include Any Modification Of Habitat.

This case arises under a challenge to regulations that the Fish and Wildlife Service (FWS) has issued to govern habitat modification under the Endangered Species Act (ESA). Section 9 of the ESA makes it unlawful

> "for any person subject to the jurisdiction of the United States to – . . .
>
> (B) take any such species within the United States or the territorial sea of the United States;

Section 9(a); 16 U.S.C. § 1538(a).

The definition provisions of the statute then define "take" to mean

> "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

Section 3(19); 16 U.S.C. § 1532(19).

The definition provision of the statute is in turn interpreted by the contested regulation as follows:

> *Harm* in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential

> behavioral patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3.

The sole question before this Court is whether the FWS regulations exceed its authorization under the ESA. It is evident that the ESA allows powerful sanctions to be imposed on individuals whose aggressive actions threaten to take, kill or wound endangered species. That is how it should be. To require the state to pay individuals not to kill endangered species is to invite everyone to encompass their death. Force must be used to meet force, just as the ESA provides.

Within this framework the term "harm" plays an essential mop-up role that insures that no form of aggressive behavior escapes the scope of the ESA. Consider its relationship to the other verbs on the list. Harass and pursue clearly cover situations where threatening acts are done to worry or vex an animal. These are acts that threaten capture, wounding or killing. For their part, hunting, shooting, wounding, killing, and trapping all involve the use of force either directly or, as in the case of traps, indirectly. None of these terms, however broad, clearly cover cases in which individuals might seek to *poison* animals (without wounding, trapping or killing them), perhaps by polluting the waters they drink or by feeding them contaminated food. Yet here again it would be socially destructive to pay people not to poison animals. In light of the statutory objectives, the term "harm" therefore should be construed in a broad and distinctive way under the ESA, *without* expanding its meaning in ways that allow it to obliterate or overwhelm the remaining terms found in the definition section of "take."

The question is whether the scope of the ESA should be further extended. Here the heavy set of criminal penalties imposed – fines of up to $200,000 and imprisonment of up to one year for each "take" – counsels against any expansion of the criminal law by administrative regulation when there is no good reason to do so. The appropriate cautionary spirit also moved Judge Williams in the court below. When he invoked the Latin maxim *noscitur a sociis* – a term is known by the company it keeps – he was only using good common sense to

fix the meaning of a term by its context. *Sweet Home Chapter of Communities v. Babbitt* ("*Sweet Home II*"), 17 F.3d 1463, 1465 (D.C. 1994). A similar conclusion was reached in *United States v. Hayashi*, 5 F.3d 1278, 1282 (9th Cir. 1993) in interpreting the term "harass" under the Marine Mammal Protection Act: "One hardly need rely on such Latin phrases as *ejusdem generis* and *noscitur a sociis* to reach this obvious conclusion [that 'words grouped in a list should be given related meaning.']." *Sweet Home II*, 17 F.3d at 1466 n.2 (quoting *Third Nat'l Bank v. Impac Ltd., Inc.*, 432 U.S. 312, 322, n.16 (1977)). No subtle canon of statutory construction is required.

Judge Williams also showed that any alternative construction of the term "harm" would lead to indefensible conclusions.

> As a matter of pure linguistic possibility one can easily recast any withholding of a benefit as an infliction of harm. In one sense of the word, we "harm" the people of Somalia to the extent that we refrain from providing humanitarian aid, and we harm the people of Bosnia to the extent that we fail to stop "ethnic cleansing".

Sweet Home II, 17 F.3d at 1464.

Indeed, the absurdities of the government's elastic definition, applied generally, make it impossible for individuals to avoid harm no matter what they do. The only way to avoid harm in Somalia or Bosnia is to expend resources for their assistance. Under the Secretary's definition, who is to say how many resources have to be expended before we move from the realm of causing harm by withholding resources to conferring benefit by expending them? In addition, *no* increase in our expenditures for their assistance can *eliminate* harm. Under the government's elastic definition, greater aid in Somalia or Bosnia necessarily "harms" the children of Appalachia or Harlem all of whom could have been aided by the same dollars. By this logic, the very enforcement of the ESA necessarily harms (and harms without compensation) not only the regulated landowners, but also the disappointed beneficiaries of every other government program whose

resources are diverted to the enforcement actions of the ESA. It is simply nonsensical, under the ESA or anywhere else, to give "harm" a definition so broad that harm is inflicted upon another person no matter what action is taken. All social and natural resources are limited. Their efficient deployment for one person cannot be treated as harming another.

The basic point here reflects familiar and important principles of political philosophy. The harm principle at stake in this litigation was not originally invented to aid in the explication of the ESA. It has a long philosophical pedigree most closely associated with the writings of John Stuart Mill. In his famous essay *On Liberty*, Mill invoked the harm principle *to limit* the role of government interference in the affairs of ordinary citizens.

> The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. The principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.

Mill, *On Liberty* 13 (Shields ed. 1956) (1859). Mill himself was alert to the risk that the harm definition could be expanded to swallow the basic presumption of liberty. Accordingly, he gave that term a sensible construction consistent with its social function by limiting it to "fraud or treachery, and force." *Id.* at 150. That caution is wholly lacking here as the disputed regulation renders the harm principle useless for its intended purpose by giving it a construction so broad that all forms of productive human activities are swept within its folds, far beyond what any conception of the law of

nuisance would require or tolerate.[1] Far from becoming a charter of individual liberty consistent with Mill's vision of limited government, the new and expanded definition of harm becomes the iron fist of an all-pervasive government presence. By verbal sleight of hand, all productive activities become a presumptive evil until they are shown to be a good – to the satisfaction of the same government officials whose expansionist impulses led to the adoption of this incorrect definition in the first place.

B. The "Actually Kills Or Injures" Language In The Disputed Regulation Places No Principled Or Effective Limits In Constraining Excessive And Unreasonable Habitat Designation Under The ESA.

A closer examination of the regulation contained in 50 C.F.R. § 17.3 offers additional support to the conclusion that the harm principle cannot be extended to cover cases of habitat modification. The first sentence of the regulation restricts "harm" to an act "which actually kills or injures wildlife." The second sentence of the regulation plunges the entire subject of harm into unwanted obscurity when it stipulates that an act that kills or injures wildlife "may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." The Solicitor General claims that this sentence "merely elaborates on the basic definition in the first sentence

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[1] On the definition of nuisance, *see, e.g., Morgan v. High Penn Oil Co.*, 77 S.E.2d 682 (N.C. 1953): "any substantial non-trespassory invasion of another's interest in the private use and enjoyment of land by any type of liability forming conduct is a private nuisance;. . . . "; *see also* California Civil Code:

> §3479. NUISANCE DEFINED
>
> Anything which is injurious to health, or is so indecent or offensive to the sense, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

by explaining its application in one particular context." Brief for Petitioners at 21. That statement is incorrect. His sugar-coated account of the second sentence in the regulation wholly ignores the massive transformation when habitat modification is treated as harm under the ESA, for it addresses none of the difficulties with the concept developed in Section A above.

The regulation is defective for yet another reason: the confusion of past with future. For animals that have been killed or wounded, it is possible to determine whether some discrete act "actually" did the harm in question. But these powers of observation cannot be brought to bear on possible future actions, which might never happen. Within this context the word "actually" loses all of its bite and imposes no limitation on the power of FWS officials to designate all the world a habitat, actual or potential, for some listed species. Since there is always future uncertainty, any change in external environment will *always* influence the probability of survival of any given species. It becomes all too easy therefore for the FWS to presume the very harm that its own regulation requires it to establish.

This use of presumptions allows the FWS inexorably to expand its vice-like hold over land use. The term habitat is not defined in the ESA and has no natural boundaries or contours. A small meadow might be a habitat for a rare bird, but by the same token it is possible to designate a number of counties as the habitat for a particular species, given the potential range over which "breeding, feeding or sheltering" can take place. Indeed just that has been done in central Texas for the ostensible benefit of the golden-cheeked warbler, thereby calling into question all construction or development. Under the definition of harm championed by the government, the entire United States could become habitat, actual or potential, for one or another of the many species that are listed, or may be listed in the future, as endangered or threatened under the ESA.

Unfortunately that exercise of raw power does not follow any specific showing that a species has "actually" been killed or injured by the particular practices that are forbidden by the

FWS. Rather the entire process represents a decision by the FWS to protect too much habitat rather than too little. To be sure, the Solicitor General noted that the actual harm language in the regulation was added in 1981 "because of concerns that the 1975 regulatory language was susceptible to an interpretation that would bar habitat modification even where there would be no resulting injury to the listed fish or wildlife, contrary to the intent of both the Secretary and the Congress." *See* Brief for Petitioners at 6 (citing 46 Fed. Reg. 54,748 (1981), J.A. 65). This calm reassurance should be treated as a *fatal* concession about the scope of the regulation, for the current, stated practices of the FWS do not give even cursory attention to the restrictive language in the habitat regulation.

The dangers of this regulatory approach are well illustrated by the tragic Riverside, California fire episode which resulted in the destruction of some 29 homes by fire in late October, 1993. In 1988, the region was designated as habitat for the Stephens kangaroo rat. Prior to that time common practice and local fire ordinances required landowners to disk their land – that is, to plow under the thick mat of desert grasses to mineralize the soil in order to prevent the spread of fires. The FWS prohibited this practice over the repeated and heated objections of local fire officials and ranchers. A letter of July 5, 1990 from Brooks Harper, the Office Supervisor of the Southern California Field Station of the FWS to Captain Paul Smith of the Riverside Fire Department stated baldly: "Therefore, disking within the historic range and *potential* habitat of this species puts the County and land owner at risk of violating Section 9 of the Endangered Species Act."[2] Is it really a sound construction of the ESA to think that Congress meant to displace routine fire prevention precautions in its single-minded pursuit of its statutory objectives? And does anyone think that the FWS could have mustered Congressional support if it had to *pay* for the substantial losses in

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[2] The full text of this letter is set out in Sugg, *Rats, Lies and the GAO* at Appendix III (Competitive Enterprise Institute, August 1994).

income to farmers, loggers and other landowners brought about by this restriction?

The expanionist impulses of the regulation's harm definition are not only revealed on matters of space, but also on matters of time. Resolving the question of whether given areas are habitat is a time-consuming and costly process in which landowners have to prove that their property does not constitute habitat once that claim of habitat has been made. The current Secretary of the Interior has written that on matters of habitat designation time is no object so that "when a species is listed, there is a freeze across all of its habitat for two to three years while we construct a habitat conservation plan which will later free up the land." Babbitt, "The Triumph of the Blind Tree Salamander," *E Magazine*, March/April 1994 at 55. The Secretary never did explain how the three-year moratorium is authorized under his own regulation, or why it does not constitute a temporary taking of property under this Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). Nor did he provide any assurances that the moratorium would be lifted when the three-year period was over without some definitive plan in the FWS.

So the process continues apace: first the regulations extend the reach of the statute; next the practice extends the regulations. What starts out as a prohibition against the killing of animals ends up as a comprehensive system of federal land use regulation, enforced by heavy criminal penalties.

C. The Acquisition Powers Under The ESA Give The Secretary And The FWS Sufficient Means For Any Responsible Government Program Of Habitat Preservation.

This radical expansion of the ESA by regulation 50 C.F.R. § 17.3 is wholly gratuitous because other sections of the ESA make specific allowance for habitat acquisition by purchase or condemnation. *See* ESA, § 5; 16 U.S.C. § 1534. So long as the government is prepared to pay the price for the private activities foregone, then it can adopt as habitat any

lands, public or private, that it sees fit. In this setting, the difficulties with defining habitat are not nearly as important as they are when the FWS acts under regulation, because any broad habitat designation carries with it an obligation to pay. The FWS will therefore have a set of built-in incentives to reach a workable accommodation on habitat even if no precise definitions are available.

But it will be said that so long as the government is required to pay for what it takes, it will take less than it can when it operates by simple decree. And rightly so. Enforcing the just compensation requirement always reduces the appetite that government officials have for private property. That limitation is regarded as fortunate when the government occupies land or restricts its viable economic use. Why is this regulation any different?

Stated otherwise, the cautionary pressure of the takings clause directs government activity along sensible paths and moderates its natural excesses. There is, so to speak, critical habitat and critical habitat, which is to say that all critical habitat, like all land, is not of equal value. The requirement that compensation be paid for loss of use to owners properly forces government experts to rank the habitat for preservation in accordance with the objectives of its program. Government officials will be forced to live with the same principles of diminishing marginal utility that apply to all other forms of rational human activities. So bound, the budgetary pressures will curb the government's expansionist impulses without the need for constant supervision of its many activities. Suitably constrained, the FWS will no longer deliberately dally for three, five or ten years before it announces its plans – or better yet, hearings on plans – to allow continued development of valuable resources. No longer will it designate vast tracts of land as critical habitats – as has been done with the golden-cheeked warbler and the Stephens kangaroo rat – without regard to the consequences that its actions have on the individuals who live and work there. Like everyone else, the FWS will work within a budget, which could be as large or as small as Congress decides.

Yet it has been said that the costs are too enormous to pay for out of revenue. *See* Brief of *Amici Curiae* Scientists at 18. But that argument confuses real economic costs with transfer payments. The economic costs for society are incurred once land is taken out of productive use, and once all development is forbidden. Once the regulation is in place, the payment of compensation for these losses does not increase their size. Nor does the nonpayment of compensation reduce the total amount of real wealth devoted to the cause of habitat preservation. Nonpayment only conceals the identity of the parties who are called in the first instance to pay these costs, and conceals from public view the size of the total burden that they are asked to pay for programs. Justice Scalia stated the fundamental difficulty with hidden taxes in *Pennell v. San Jose*, 485 U.S. 1, 22 (1988) (Scalia, J., concurring): "The politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved "off budget," with relative invisibility and thus relative immunity from normal democratic processes." It is just this "off-budget" invisibility that calls for reproach of the Secretary's regulation. The *amici curiae* scientists may well be correct in the high social priority that they attach to habitat and species preservation. But if so, they should be candid about what those costs are. On countless occasions this Court has noted that the function of the just compensation clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). That fundamental lesson was respected in the original drafting of the ESA. The Secretary should not be allowed by clever redefinition to escape the built-in structural limitations that are contained within the ESA.

The basic theoretical point made here has already been borne out in practice in the aftermath to this Court's decision in *Lucas*. In that case, this Court remanded the case to the South Carolina courts to determine whether the restrictions imposed on the Lucas holdings constituted a regulatory taking. When that court found that they did, *Lucas v. South*

Carolina Coastal Council, 424 S.E.2d 484 (S.C. 1992), the lots in question were deeded over to the state for about $1,500,000. How quickly the incentives change! No longer did public officials make pious declarations that the emptiness of two prime beachfront lots was indispensable to the well-being of the fragile South Carolina coast and that cost to the landowner was irrelevant. Nothing stopped the Coastal Council from keeping and managing the land in the most environmentally responsible way imaginable – except the $1,500,000 in taxes needed to pay for lands that were worth that much in private hands. But no responsible land manager could justify the expenditure of that large sum of money on holding these lots empty when it was difficult to raise even a tenth of that sum to replenish sand on public beaches lost to erosion. So South Carolina swallowed its pride and did the only sensible thing: it sold off the lots to the highest bidder *with* the right to build the same single family residences that Lucas had planned to build in the first place. The need to pay for what one takes changes behavior for the better. That truth was respected in the text of the ESA. And it was ignored in the regulations.

The aftermath of *Lucas* is instructive as well because it gives the decisive answer to the arguments that were raised by Judge Mikva in the original *Sweet Home* decision. There he claimed:

> There is also little force behind appellants' claim that including habitat modification within the meaning of "take" renders the land acquisition provision of § 1534 a nullity. Appellants suggest that agency officials will not pay to acquire land if they can accomplish the same objective without cost by banning the offending land use. But there are in fact many reasons why, in its effort to protect endangered and threatened species, the government might choose to acquire land rather than simply forbid damaging activity. Federal wildlife managers can surely do more to help such species on government-owned and controlled preserves than they could ever accomplish on private lands.

Sweet Home Chapter of Communities for a Great Oregon v. Babbitt ("Sweet Home I"), 1 F.3d 1, 10 (Mikva, J., writing separately). But this passage ignores the powerful incentives at work once habitat designation becomes a routine alternative to the acquisition of critical habitat by purchase. Thus even if one supposed that the government could achieve only 90 percent of its objectives by designation, what likelihood is there that it will purchase the full 100 percent of land value to obtain that remaining ten percent of control? Instead its path of least resistance is to impose endless conditions before allowing the private use or development of land. The extensive delays and oppressive use of the permit power offer the government easy vehicles to reach its end, so that the voluntary acquisition becomes a side show to the main act. That conclusion is borne out by the available figures on habitat acquisition by purchase, which were listed at $253,900,761 to purchase 359,755 acres between 1967 to 1993. U.S. General Accounting Office, Report No. GAO/RCED-95-16, *Endangered Species Act: Information on Species Protection on Nonfederal Lands* at 4-5 (1994). That figure works out to about $10,000,000 per year in acquisition of about 15,000 acres per year. To put the magnitude of the land acquisition program in proper perspective, contrast its 359,755-acre size with a number many times larger, the 3.8 million-acres of "coastal scrub habitat" in a "regional conservation plan for a single species," the coastal California gnat-catcher. *See* Brief of the *Amici Curiae* Scientists at 19 n.48. The habitat-by-designation program ties up unknown hundred-fold of land by both acreage and value, for which the FWS pays nothing by way of compensation for the loss of use. Contrary to what Judge Mikva supposes, it is passing strange that the habitat acquisition program that is specifically outlined in the ESA should account for, at a guess (since no one can say for sure what the total costs are) far less than one percent of the total resources devoted to habitat preservation. Can one say with a straight face that over 99 percent of the social resources devoted to habitat preservation should come from an administrative interpretation which is totally without any underlying statutory authorization?

D. The Mitigation Programs Available Under The ESA Do Not Justify The Secretary's Expansive Definition Of Harm.

The extent of the government power to take over property by unilateral and unreviewable designation is also revealed by another commonly-used government practice under the ESA. In the topsy-turvy world of environmental regulation the Secretary may issue "incidental take" permits on condition that the regulated landowner "mitigate" the environmental damage, that is, make certain accommodations on other portions of his land. The Secretary is empowered under this section to issue the "incidental take" permit "under such terms and conditions as he shall prescribe." These terms and conditions include the setting aside of other lands for critical habitat, and contain a further provision that "the applicant will ensure that adequate funding for the plan will be provided." *See*, ESA, 16 U.S.C. § 1539(a). This permit power has Alice-in-Wonderland consequences when "harm" is construed wrongly to cover all cases of habitat modification, however innocent or beneficial. The ESA expressly provides that the United States shall buy land for habitat preservation. Under the regulations now in effect, FWS sometimes allows an owner to buy back some of the use rights he or she possessed before the habitat designation. But at no point does FWS assume any of the burdens or liabilities associated with ownership. It is easy to see why the condemnation alternative will be avoided when habitat designation is allowed.

In principle the government's mitigation program might have desirable features. One of the common criticisms of regulation is that it is so rigid that there are no corrections of original mistakes in resource allocation brought on by a government decree. The mitigation option allows the necessary corrections to take place by contracts between government and private parties, and surely an ESA with some mitigation is better than a statute that only allows the FWS to remove land from use and development, never to return.

But this mitigation program is inherently unstable. The FWS insists that it has the power to sell to private individuals use and development rights. But it never explains how it

acquires those rights in the first place because it cannot candidly acknowledge that it can only resell rights that it has just taken by designation from their owners. Nor can the FWS acknowledge that the same process that produced one set of permit requirements, followed by mitigation, can be invoked a second and a third time, so that a transaction never comes to closure, and the security of ownership is lost forever. While land is costly for its owner to acquire, the *re*designation of that same land as critical habitat is costless for the government to pursue. If a landowner can be required to set aside half of his land to provide habitat for a listed bird in one day, then he or she can be required to set aside half of the remainder as critical habitat for the endangered tree-frog the next, until by degrees all is lost.

The problem raised by this regulation illustrates a fundamental truth about the powerful effect that legal incentives have on both public officials and private persons. *See* Buchanan, *Constitutional Economics* 37-38 (1991); Gwartney, "Public Choice and the Conduct of Representative Government," in *Public Choice and Constitutional Economics* 3, 7-10 (Gwartney & Wagner, eds. 1988); Macey, *Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223 (1986). The reason why one does not try to buy out one's enemies in time of war is that it only invites others to commit aggression in the same fashion. And so it is here. The FWS regulation on property rights only invites the government to resell land that it first takes by unilateral designation. To treat this regulation as a fair explication of the statute is to celebrate a process where the government first designates itself the creditor for $1,000 and then agrees to magnanimously settle the claim for half that amount, only to adopt that same strategy again and again until all private wealth winds up in public hands. To take comfort in using mitigation for habitat designation is little better than to celebrate the thief who is quite willing to sell property back to its original owner in ways that mitigate his loss.

A common error infects all this prescription for sound government: creating the opportunity to repurchase only

encourages the original wrongful act. So long as that is the case, then government should be able to demand mitigation as of right only when it can show that the individual landowner has done some form of a *wrong*, which is impossible with habitat modification unless the uniform voice of the common law of this country and England has all along confused productive uses with common law nuisances.[3] Only if the obligation to compensate for the imposition of habitat restrictions is placed squarely on the government – which the ESA and the takings clause of the Fifth Amendment both require – will it be possible to escape this surreal world. The horror stories that abound in briefs presented by various groups and state officials in their amicus briefs, of which the tale of the Stephens kangaroo rat is only one, *infra* at 11-12, all happen for a structural reason. The FWS has no strong reason to limit its demands when it is not required to pay for the habitat it acquires.

E. The Incentive Effects Created By The Secretary's Regulation Lead To The Destruction Of The Very Habitat That The Government Wishes To Preserve.

The full mischief of the habitat regulation is not captured by a discussion of the baleful effects that this regulatory

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[3] The account of the Roman law of capture for wild animals is wholly garbled in the Brief of the *Amici Curiae* Scientists. *See Id.* at 24. The traditional Roman Law position was that all wild animals were *res nullius* (which is not the same as *res communes*, or common property), which could be reduced to private ownership, without limitation by capture. *See* Justinian, *The Institutes* 66 [Book II] (Thomas ed. & trans. 1975) (A.D. 553): "Wild animals, birds, and fish, that is to say all the creatures which the land, the sea, and the sky produce, as soon as they are caught by anyone become at once the property of their captor by the law of nations; for natural reason admits the title of the first occupant to that which previously had no owner." For a similar sentiment *see* Gaius, *The Institutes* 153 [66] (Gordon & Robinson eds. & trans. 1988) (circa A.D. 179). Justinian had discussed common property earlier. Justinian, *supra*, at 65-66. Only later did recognition arise of the capacity of sovereigns to prohibit the capture of wild animals. *See* Grotius, *The Law of War and Peace* 81-82 [Book II, Ch. II] (Loomis trans. 1949) (1625). At no point in a classical source in either the English or civil law tradition is there any glimmer of the proposition that the sovereign could acquire critical habitat by simple designation.

process has on government behavior. A complete analysis of the incentive effects of any legal rule also considers the position of the regulated parties as well as that of the regulator. Just that concern with incentives is what explains why the ESA rightly imposes punishments on individuals who kill, wound or capture members of listed species. To see why that is the case, assume that the converse were adopted, so that the state decided to *pay* all individuals *not* to harm these animals. If there were only a *single* individual, then the choice of compensation or punishment would be of little consequence. The optimal payment could substitute for the optimal fine to make sure that listed species received the protection intended for them under the statute. *See*, Coase, *The Problem of Social Cost*, 3 J. Law & Econ. 1 (1960); Wittman, *Liability for Harm or Restitution for Benefit*, 13 J. Legal Stud. 57 (1984). But it is manifestly the case that *many* individuals pose threats to listed animals, and the choice of the legal rule has a decisive effect on the behavior of large groups of unorganized officials. Any system of compensation for not taking animals would induce individuals who otherwise would never care to kill or take listed species to make threats that would elicit compensation from the government. The supply of private offenders, however, is far more limited than the supply of government permits for public officials. The use of fines changes that result enormously, for now individuals who harm – the word is used here in ordinary English – animals know that they will pay a price that is at least as great as the social harms that their actions cause. It is, of course, a difficult question to determine the optimal level of deterrence, given the uncertainties over the frequency of harm and the severity of its occurrence. But at least the sanctions imposed for harming listed species move in the right direction, even if they are imperfectly calibrated.

Once the question turns to the modification of habitat, these vital incentive arguments cut in the opposite direction. Thus when the government decides to pay individuals for valuable habitat that is on their land, the net result is to elicit their cooperation. Persons who discover that they have a valuable stream or nest on their property now have every

reason to preserve and protect it, because that habitat is an asset which can then be sold to the government, or, more sensibly, to a private group or association dedicated to the purchase of critical habitat. The key point is that the individual on whose property the habitat is located profits to the extent that the habitat is preserved. Even if that person does not want to sell the habitat for some stated price, then there is good evidence that the habitat, however valuable in its own right, may be more valuable in some other use.

It may well be objected that the purchase option in this case does not create optimal incentives for the protection of habitat, given the limitations on public funding and the pressure of alternative private uses for land and water. But the best should never be the enemy of the good. The correct question to ask is not: does the compensation system contemplated under Section 5 of the ESA provide optimal incentives for habitat preservation? No set of rules can achieve that set of goals. Rather, the only question worth asking is whether the incentives created by a compensation system are better than those which the Secretary has created out of whole cloth under his regulations. They are not. Consider this recent account:

> Ross Perot had a problem. In 1990 his development company wanted to turn 330 prime acres of real estate near Austin, Tex., into shops and homes. But the land was chockablock with ash juniper trees, the sole source of nesting material for a little bird called the golden-cheeked warbler. The warbler was about to come under the protection of the Endangered Species Act, which would make it illegal to harm its habitat. So Mr. Perot's company did what just about anybody would do – it chopped down the trees as fast as it could.

Mann & Plummer, "Environmental Law is Wrecking the Environment," *The New York Times*, March 2, 1995, at A15.

It is easy to see why "anybody" would do the same thing. The social gain comes at too high a private price. But the deleterious effects of the regulation cut still deeper because the regulation surely induces *illegal* actions as well. To see

why, imagine the utter dismay that a landowner must feel when he discovers that valuable habitat for a listed species might be on his land. The ESA celebrates the presumption that there are enormous social gains from this discovery. The Secretary's regulation assures that the landowner suffers enormous private losses if information about the habitat is made public. Now the private choices are these: *one*, destroy the private habitat of listed species and run the risk of serious penalties under the law; *two*, report or allow the information to be discovered, and then bear an enormous, uncompensated cost when farming, logging, building, fishing and the like are all disrupted. It is of course possible to raise the sanctions on wrongdoers so high that in the interests of self-preservation they will prefer the loss of home and livelihood to the rigors of a long jail sentence or heavy fine. But to adopt this course of action has bad consequences of its own, for it throws the entire criminal law into disrepute by equating the productive use of one's own land with the destruction of the property of others.

It is critical to dwell upon the incentive effects of these habitat regulations at such length, not only to show the extraordinary legal innovations that are introduced through regulation, but also to point out the enormous gaps in reasoning in the brief on behalf of a distinguished roster of *amici* scientists. It is not our point here to quarrel with the overriding weight that these scientists attach to the question of habitat preservation. It is their prerogative to give great weight to matters that may carry less weight to ordinary citizens who lack this deep professional and intellectual commitment. Our point is to demonstrate that nothing in the *amici* scientists' brief recognizes that the *means* chosen under the ESA will backfire for its chosen end, given the perverse incentives it gives ordinary citizens who labor under the lash of the regulation.

It is also worth noting that most of the ills that are addressed in the brief of the *amici* scientists cannot be cured by *any* interpretation of the ESA. Many endangered species

live in the tropics, beyond the jurisdiction of the United States. For these species the only chance that we as outsiders have to improve the situation is to adopt the alternative that is belittled here – to pay compensation in order to set aside large scale habitats for the preservation of these species. *See* Myers, *The Sinking Ark: A New Look at the Problem of Disappearing Species* 265-66 (1979). One means for carrying out that program is so-called debt for nature swaps whereby "an international environmental organization buys foreign debt in exchange for agreement by the debtor country to protect its natural resources or to promote conservation." *Developments in the Law: International Environmental Law*, 104 Harv. L. Rev. 1484, 1570 (1991). The compensation approach is vastly superior to raising the sanctions on wrongdoers. Closer to home, vast amounts can be done to improve the weak management of public lands that arises precisely because neither government officials, nor the private firms that deal with them, reap the gains from careful stewardship and management. Experience demonstrates that private nature conservancies can do a better job in species preservation than the Federal government. A key reason for their success is that these private preservers must operate through the purchase mechanism that is belittled by the *amici* scientists.

The affirmation of imperative ends does not guarantee intelligence in the selection of sensible means. It is not sufficient to say that deprivation of habitat and the killing of listed species are the same simply because they each have the same effect on endangered species. Rather, the task is to devise a set of social institutions that encourage responsible conduct and reasoned tradeoffs and not the wholesale overreaching by government officials, and destructive counterstrategies by private parties who seek to avoid its burden. The *amici* scientists assume the wisdom of the Secretary's habitat modification strategy. They do nothing to demonstrate it, or to show how their own preferred policy objective is consistent with the language and structure of the ESA.

II. THE COURT OF APPEALS' INTERPRETATION OF THE ESA IS CONSISTENT WITH THE STANDARDS OF REVIEW SET OUT IN *CHEVRON U.S.A., INC. V. NATURAL RESOURCES DEFENSE COUNCIL*.

In the course of its brief, the government places great reliance on this Court's seminal decision in *Chevron*. There this Court articulated the following two-part test which guides this current inquiry:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43.

A. The Habitat Modification Regulation Is Invalid Under The First Prong Of The *Chevron* Test.

The first prong of *Chevron* requires respect for Congressional intent when the statute is clear. The clarity of a statute cannot be ascertained by referring solely to the isolated terms – here "take" and "harm" – which are subject to interpretation. These terms are embedded in a complex statutory scheme, and they are illuminated in relationship to other portions of the statute. Even if one thought that the term "harm" and hence the term "take" were infinitely elastic when standing alone and taken out of context, that interpretation would be falsified by the other provisions of the statute which

place it in context and set definable boundaries against the Secretary's expansionist impulse. Once "take" in section 9 of the ESA is read in conjunction with the habitat acquisition provisions in section 7 of the ESA, then "take" becomes far clearer than it does when standing alone. Section 9 deals with private parties and in respect to them it is appropriate to forbid only those actions which are tantamount to aggression against endangered species. Yet section 7 is primarily directed to "Interagency Cooperation" in the administration of lands that are already owned by the Federal government. In that connection there are no private rights that limit the exercise and use of federal power. It is perfectly permissible to require, as *only* section 7 provides, to "insure" that any "agency action" does not "jeopardize the continued existence of any endangered species or threatened species *or* result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536(a)(2) (emphasis added). The contrast between jeopardizing a species and habitat modification shows how Congress "directly addressed" the "precise question" that is before this Court. The Court need go no further than section 7 to determine the precise meaning of "take" and "harm" as it is used in section 9 of the ESA. In one sense therefore the inquiry is at an end; for this statute, read as a whole, is neither silent nor ambiguous.

B. No Deference Is Warranted Under The Second Prong Of *Chevron* Since The Habitat Modification Regulation Would Eviscerate Vested Constitutional Rights And Would Run Roughshod Over Traditional State Police Powers Essential To The Safety Of The Community.

Even if some lingering doubt remained about the first prong of *Chevron*, it seems clear that the interpretation impressed upon the ESA by the Secretary's regulations cannot be sustained under the second prong of the *Chevron* test. The second prong of *Chevron* says that in those cases in which there is some ambiguity, a court ought to defer to the agency. But there are important considerations, not present before the Court in *Chevron*, which when understood limit the scope of

permissible judicial deference. *Chevron* involved the question of how many smokestacks constituted a single source under the Clean Air Act. At issue in that case was the question of whether all smokestacks from a given plant should be treated as a single new source – such that the regulated entity was free to move pollution back and forth among these devices so long as it complied with an overall cap – or whether each smokestack should be treated as a separate point source subject to its own distinct limitations, without the benefit of trade. The EPA reached the *sensible* conclusion that the stacks could be treated as a single unit, given that this rule promoted a greater level of plant efficiency at zero or negligible environmental cost. But even if that decision had come out the other way, it was perfectly clear within the context that *neither* decision by the EPA would raise serious constitutional issues. Yet those concerns clearly limit the scope of deference under *Chevron*. As this Court wrote in *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 465-66 (1989):

> When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. *Crowell v. Benson*, 285 U.S. 22, 62 (1932). . . . It has long been an axiom of statutory interpretation that "where an otherwise acceptable construction of a statute would raise serious constitutional problems the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988).

Just that situation has developed here, given the blanket denial of all compensation claims under the Secretary's regulation. The government cannot rely on *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) because that case held that the disputed regulation was valid precisely

because it did *not* preclude a takings challenge for its excessive application. But in this case, the whole point of expanding the definition of harm to include habitat modification is to cut off the very prospect of compensation that saved the regulation in *Riverside Bayview Homes*, where the government prevailed "on the principle that so long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional." *Id.* at 128. That possibility is blocked off by definition if the modification of habitat regulation is sustained by this Court. Surely it surpasses all understanding to say that the government can defend a regulation intended to impose compliance without compensation on the ground that it has admitted power to impose the same regulation with compensation! There is, accordingly, no occasion for *Chevron* deference here.

Moreover, the collision between habitat regulation and the takings clause will necessarily arise in some significant class of cases now that the FWS can stop all use and development of land dead in its tracks. Actions of that sort are routinely regulatory takings under *Lucas* and/or temporary takings under *First English*. Ironically, the government that demands a broad definition of "taking" under the ESA insists on the narrowest possible construction of that term under the Constitution. There is, however, authority in the circuit courts which indicates that deference to administrative determinations cease under *Chevron* when the government actions work a taking of private property. *See e.g.*, *Bell Atlantic Tel. Cas. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994) ("*Chevron* deference to agency action that creates a broad class of takings claims, compensable in the Court of Claims, would allow agencies to use statutory silence or ambiguity to expose the Treasury to liabilities both massive and unseen."). All the more is that deference misplaced when Congress itself has specified the compensation route which the administrative regulations consciously seek to evade or ignore.

It follows therefore that the level of deference afforded administrative agencies under *Chevron* should be sharply limited when the interpretative issue concerns the exercise of their delegated authority. As John Locke stated long ago, the

elected political branches of government themselves operate by the authority delegated to them by the people: "The legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others." Locke, *The Second Treatise of Civil Government* 71 [¶ 141] (Gough ed. 1948) (1689). Locke's concerns with delegation remain imperative even in the current world of administrative agencies. While it is tempting to defer to agency determinations on the ground of their supposed expertise, that argument rings hollow where the issue in question is the construction of a term that has a settled meaning in the law of tort and a clear philosophical pedigree. It is doubly misleading when the agency in question has a built-in bias. Another requirement of the just state, according to Locke, is "a known and indifferent judge, with all authority to determine all differences according to the established law." *Id.* at 63 [¶ 125]. That condition of neutrality cannot be achieved when administrative power is wielded by those with a single-minded determination to achieve a single end, and wielded over those who have a different, but equally valid conception, of the social good.

The principle reached here is not one that is either new or novel. Indeed that rule of construction has been applied even in England whose system of Parliamentary supremacy necessarily precludes any entrenched protection of individual rights against the government. Nonetheless the important moral, social and economic place of private property within the overall legal system has led to exactly the conclusion that is urged here: ambiguous statutes ought not be read in ways that authorize the confiscation of private property. Thus in *Mayor of Bradford v. Pickles*, 1895 App. Cas. 587 (H.C.), an 1842 statute conferred upon a private company the power to take certain water and simultaneously imposed fines on other individuals that made illegal diversions from that water. The corporation then transferred those rights to the Town of Bradford in 1854 by a new statutory grant that reaffirmed that the Town had succeeded to all rights held by its private predecessor in title. The question of statutory construction was

whether these two statutes vested, first in the original company and then in the Town, the right to all flowing water (not in a definite channel or watercourse) or whether that statute only protected from "illegal" diversion that water that the Town had purchased from its owner. Whatever doubts might have existed on linguistic grounds could not defeat the equities of the individual landowner. Under an early version of the clear statement rule "the mere fact that the section, as construed by the plaintiffs, affords no right to compensation to those whose rights might be affected, is conclusive against the construction contended for by the plaintiffs." *Id.* at 594. The basic point was unexceptionable. Even where the literal text of the statute seems to be in *favor* of the construction pressed by the government, the statute will be construed to protect property rights against outright confiscation. Surely the level of deference to administrative agencies under *Chevron* cannot be greater when these constitutional guarantees are in place.

There is a second reason why *Chevron* deference is not appropriate under the circumstances of this case. *Chevron* itself dealt with a situation where federal preemption was clear and without doubt. But this Court has taken a view that comity between federal and state governments is an important value, such that preemption should not be lightly inferred when it requires the state to forfeit the exercise of its essential police power functions: the protection of life and property. In *Milwaukee v. Illinois*, 451 U.S. 304, 316 (1981), this Court sharply distinguished between the federal preemption of federal law and the federal preemption of state law, saying:

> Contrary to the suggestions of respondents, the appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal law pre-empts state law. In considering the latter question " 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Jones v. Rath Packing Co.*,

430 U.S. 519, 525 (1977) (quoting *Rice v. Santa Fe Elevator Corp.* 331 U.S. 218, 230 (1947)).

Yet this trampling of local authority will surely take place if the habitat regulation is upheld. There are many local ordinances that require, for example, the disking of land to prevent the spread of fires. The Riverside County Fire Ordinance required such disking, which was forbidden by the FWS in its effort to protect the habitat of the Stephens kangaroo rat. It takes a good deal of wishful thinking to believe that Congress when it passed the ESA had so single-minded a purpose that authorized any lowly regional administrator within FWS to trump all state fire protection laws. The touchstone of statutory construction is a fair effort to construe statutory language so that it achieves Congressional objectives without trenching on the prerogatives of the states. No deference under *Chevron* is required when the known consequences of the Secretary's regulation are the frustration of the purposes of species preservation, the destruction of private property and the productive energies that it can release, and the invalidation of all local fire regulations essential for the protection of human life and property.

CONCLUSION

The decision of the Court of Appeals for the District of Columbia should be affirmed.

Respectfully submitted,

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In The Supreme Court of the United States

October Term, 1994

Bruce Babbitt, Secretary of the Interior, *et al.*,
Petitioners,

v.

Sweet Home Chapter of Communities for a Great Oregon, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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AMICUS CURIAE BRIEF OF THE COMPETITIVE ENTERPRISE INSTITUTE IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-859

BRUCE BABBITT, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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AMICUS CURIAE BRIEF OF THE COMPETITIVE ENTERPRISE INSTITUTE IN SUPPORT OF RESPONDENTS

The Competitive Enterprise Institute (CEI) hereby files this amicus curiae brief in support of the respondents in this case. Pursuant to Supreme Court Rule 37.3, letters of consent to this filing have been obtained from counsel for all parties and have been lodged with the Clerk of the Court.

INTEREST OF THE *AMICUS CURIAE*

CEI is a non-profit research and advocacy organization committed to the principles of free enterprise and limited government, and to advancing private solutions to regulatory issues. CEI is incorporated in the District of Columbia as a tax-exempt organization. Through its pub-

lications, forums and litigation activities, CEI has been actively involved in such issues as private property rights and wildlife conservaton.

CEI submits that, through the regulatory definition of "harm" promulgated by the Fish & Wildlife Service (FWS) in 1981, 50 C.F.R. § 17.3, the Secretary of the Interior has employed unauthorized means to reach the Act's goal, in the process illegally imposing the burden of achieving that goal onto private property owners and other non-federal entities. CEI submits this brief to assist the Court in understanding how the Secretary actually applies the "harm" regulation in practice, to the detriment of private landowners and in violation of the Act itself.

SUMMARY OF ARGUMENT

There is little doubt that Congress was well aware of the problem habitat loss posed to wildlife, as the legislative history of the Endangered Species Act (ESA or Act) is replete with such evidence. *See, e.g.*, S. Rep. No. 307, 93d Cong., 1st Sess. 2 (1973); H.R. Rep. No. 412, 93d Cong., 1st Sess. 2 (1973). However, what cannot be found in either the ESA's legislative history or its statutory design is any indication that Congress intended to prevent habitat loss on private property through Section 9's prohibition on "take." 16 U.S.C. 1538(a)(1).

Through the promulgation of its 1981 regulatory definition of "harm" within the meaning of "take," the government exceeded its statutory authority and sought to prohibit "habitat modification" through its "harm" definition. In a vain attempt to restrict "harm" within the statutory ambit of "take," the government's definition of "harm" is ostensibly limited to acts which "actually injure or kill" protected wildlife. 50 C.F.R. § 17.3. Yet the government routinely implements "harm" without any proof of such effects whatsoever. In practice, the government simply presupposes that modification of endangered species' habitat constitutes a prohibited "take."

We submit that the government's "harm" regulation is among those rules which, "by requiring land to be left in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Lucas v. South Carolina Coastal Council,* 112 S. Ct. 2886, 2894-95 (1992). In order to prevent this abusive practice from continuing, the decision below should be affirmed.

ARGUMENT

I. CONTRARY TO THE GOVERNMENT'S ARGUMENTS REGARDING THE OSTENSIBLE LIMITATIONS OF ITS DEFINITION OF "HARM", ITS "HARM" REGULATION IS REGULARLY IMPOSED ON PRIVATE PROPERTY WITHOUT ANY SHOWING OF ACTUAL DEATH OR INJURY WHATSOEVER.

The government argues that the Court of Appeals "failed to take into account the fact that the requirement of showing 'actual death or injury' directly traceable to habitat-disturbing actions imposes significant limitations on the regulation's application". Pet. Br. 45. According to the government, "the carefully tailored 'harm' regulation does not apply to habitat modification or degradation generally. It is limited to such actions that actually kill or injure." Pet. Br. 16.

As is shown below, however, in practice the Secretary ignores such vague constraints and interprets the "harm" regulation to impose federal land-use controls on the basis of listing. The Secretary himself has written:

> "When a species is listed, there is a freeze across all of its habitat for two to three years while we construct a habitat conservation plan which will later free up the land." [1]

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[1] Bruce Babbitt, "The Triumph of the Blind Texas Salamander and Other Tales from the Endangered Species Act," *E Magazine,* March/April 1994, at 54-55.

For purposes of this case, whether the Secretary really ever "will later free up the land" is immaterial. The real issue is whether he has the authority to "freeze" it in the first place.

The interpretation of "harm" illustrated by this quote is effectively the same prohibition on habitat modification that the Senate deleted from the ESA before its passage in 1973. *See* JA 60-61. As the government admits, that prohibition "would have made *all* destruction, modification or curtailment of a listed species' habitat or range a 'take,' regardless of the effect on a listed species". Pet. Br. 16.

The only authority the Secretary could possibly have for such a "freeze" is the government's interpretation of "harm." As illustrated below, a significant body of official correspondence from FWS to private landowners makes it clear that the Secretary's actual interpretation of "harm" is far different than what he presents to this Court.

A. The FWS Routinely Concludes That Modifying "Suitable" Habitat Is Tantamount To Violating The Act.

Margaret Rector, now a 75 year-old retiree, purchased 15 acres of prime Texas real estate in 1973 as an investment, hoping to later sell the land to supplement her retirement income. However, in 1990, about the time Ms. Rector began trying to sell her property, the golden-cheeked warbler (a neotropical migratory songbird) was listed as "endangered" under the ESA. 55 Fed. Reg. 18,844 (1990). "I have tried to sell this property for the past five years," Ms. Rector laments. "Dozens of prospective buyers have inquired about my land as it is in a fast growing area of the county. When told of the restraints placed on it by the ESA, they are no longer

interested." The assessed value of her land plummeted from $830,960 in 1991 to $30,380 in 1992.[2]

Such restraints and losses are the result of the Secretary's interpretation of "harm", which is the only descriptor within the meaning of 'take" that the FWS claims authorizes land-use regulation. JA 50. In 1992, the FWS conducted an "endangered species habitat assessment" of Ms. Rector's 15 acres, and found that it "contains mature oak-juniper woodland that constitutes suitable golden-cheeked warbler habitat." [3] On this basis alone, the FWS concluded:

> "Due to the likelihood of encountering warblers during some portion of the breeding season, it is our opinion that surveying your property would be unnecessary. As we discussed in our January 30 meeting, we believe that a Section 10(a) permit would be required to clear habitat or develop your property." [4]

A Section 10(a) permit is an "incidental take" permit. 16 U.S.C. § 1539(a)(1), (a)(2). Thus the FWS concluded that a "take" would result from habitat modification without even surveying the property to determine whether members of a listed species were actually present, let alone determining whether such modification would "actually injure or kill" any member of such species. This interpretation of "harm" clearly defies the judicial interpretation that "harm" only extends to activities that "actually, as opposed to potentially, cause harm." *American Bald Eagle v. Bhatti*, 9 F.3d 163, 166 (1st Cir. 1993).

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[2] Personal Remarks Regarding Land Problems Encountered With the USF&WS Over the Endangered Species Act Rulings, Attachment G to a letter from Margaret Rector to Senator Orrin G. Hatch, Nov. 1994.

[3] Letter to Margaret Rector from Sam D. Hamilton, FWS Field Supervisor, Feb. 18, 1992.

[4] *Id.*

In 1993 the FWS sent Ms. Rector another letter, reiterating its impermissible interpretation of "harm": "We believe this property would be suitable habitat for the federally listed endangered golden-cheeked warbler and/or the cave invertebrates." [5] Without even knowing *which*, if any, of the six species in question might potentially reside on Ms. Rector's land, the FWS concluded: "We believe that clearing or development-related activities of this acreage would constitute a 'take' as defined by the Endangered Species Act." [6]

Other residents of Travis County, Texas, have had similar encounters. Marj and Roger Krueger, for example, spent over $40,000 on a 1.5 acre lot on Foxtree Cove, the only lot on the cul-de-sac that did not have a house or a foundation already built. They spent another $10,000 on architects, attorneys and biologists. The Krueger's lot had been cleared of vegetation well before the golden-cheeked warbler was even listed as "endangered." Nonetheless, because golden-cheeked warblers had been sighted in "the canyons adjacent to Foxtree Cove," the FWS concluded "that authorization under the Endangered Species Act would be required" before they could begin construction on their lot.[7]

Such an interpretation of the Section 9 "take" prohibition is hardly consistent with the government's assertion

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[5] Letter to Margaret Rector from Sam D. Hamilton, FWS State Administrator, June 8, 1993.

[6] *Id.*

[7] Letter to Lee Sherrod, Horizon Environmental Services, Inc. from Sam D. Hamilton, FWS State Administrator, July 9, 1992. In an earlier letter, the FWS had informed Mr. Sherrod that the lot was "adjacent to one of the largest blocks of contiguous, occupied golden-cheeked warbler habitat remaining in Travis County," adding that building the Krueger's home "could result in a violation of Section 9." Letter to Lee Sherrod from FWS, July 25, 1991, at 1. However, the FWS noted that building a house on another lot across the street on Foxtree Cove that already had a foundation built on it "would not be in violation of Section 9" because it was "located between existing homes." *Id.*

that harvesting timber on unoccupied habitat could violate Section 7 but "would not . . . be prevented by the Section 9 'take' prohibition". Pet. Br. at 42. Nor does the "harm" regulation as applied in the Krueger's case comport with the limiting qualifications of the Secretary's 1981 revision of the "harm" regulation: "To be subject to section 9, the modification must be *significant,* must *significantly impair essential* behavioral patterns, and must result in *actual* injury." JA 72. But then again, there are few examples that do comport with such purported limitations.

MaBe, Inc. planned to build 173 homes in its Westminister Glen Subdivision, a 270 acre property in Travis County, Texas. During the 1980s, the company put in roads, utilities and other infrastructure on Phase I, 116.72 acres of the property that were platted for residential development long before the golden-cheeked warbler was listed in 1990. Phase II, the remaining 153 acres, was also platted for residential development. But soon after the warbler was listed, it became apparent that Phase II actually contained warblers—two pairs with fledglings. In order to obtain a 10(a) permit for Phase I, MaBe, Inc. was required to cede over Phase II to be managed as a warbler preserve under a conservation easement.[8]

In 1994, the FWS acknowledged that "yearly biological surveys conducted on the site since 1991 have not revealed the presence of the warbler on the Phase I development area proper."[9] Indeed, the FWS wrote, "construction of single-family homes within the Phase I area of Westminster Glen will alter *low quality warbler habitat areas which have not been documented to be utilized by the warbler.*"[10] Perhaps this "low quality warbler habi-

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[8] FWS, Environmental Assessment and Habitat Conservation Plan For Westminster Glen 1 (July 1994).

[9] *Id.* at 5.

[10] *Id.* at 15 (emphasis added).

tat" explains the warblers' four year absence from the property. Yet, as evidenced in the Krueger's case, no actual members of a listed species needed to be present for FWS to preclude someone from using their own land under its "harm" regulation:

> "Although the Phase I development area does not contain occupied warbler habitat, the Service considers the development of this area would result in direct destruction of warbler habitat which would result in indirect 'take' of one warbler territory." [11]

Why?

> "The Service currently believes that development activities in general will cause indirect impacts to the warbler due to habitat fragmentation, and an overall decrease of the contiguous habitat patch size. Encroachment of noise and activity within close proximity of nesting pairs, and introduction or increase of predator species (i.e., cowbirds, jays, house cats, fire ants) into otherwise low-predator density areas are also potential impacts of adjacent development." [12]

Thus, the FWS concluded that the nearest warbler would reduce its utilization of "a 250-foot band around the north, west and south perimeters of the developed lots compromising an additional 46.4 acres within which one warbler territory has been documented to occur." [13] After calculating the acreage of the impacted "perimeter," the FWS then calculated the "take" involved, on the assumption that each pair of warblers needs from 3 to 25 acres of habitat for "territory." [14] Since "indirect take is assumed to apply at 50 percent of the acreage . . . in-

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[11] *Id.* at 16.

[12] *Id.*

[13] *Id.*

[14] *Id.* at 6.

direct take results in the net loss of 23.2 acres." [15] Half of the 46.4 acre perimeter equals 23.2 acres, which is roughly equivalent to one warbler "territory."

To reiterate, *none* of the 116 acres of land proposed for development had ever been documented to contain warblers. The "taking" involved not the "modification" of occupied habitat, but the "destruction" of perimeter habitat potentially utilized by warblers on land adjacent to the proposed development. In sum, the FWS explained, "a total of 107.4 acres (84.2 acres direct unoccupied low quality habitat and 23.2 acres indirect) of habitat with one documented territory and several sightings would be affected." [16]

Thus, the FWS claimed that the Section 9 prohibition of "take" would be violated by the "encroachment of noise and activity" within the 46.4 acre band around the perimeter of the proposed housing development. No "significant habitat modification or degradation" was involved. No "actual death or injury" was even alleged. The FWS simply calculated that "indirect take is assumed to apply to 50 percent of the acreage." In other words, all the FWS needs to determine "harm" under the Secretary's definition is one sighting of one member of an endangered species within 300 feet of a proposed change to landscape that is not even utilized by endangered species. If such conditions are found, the FWS can assert that ordinary uses of private property violate federal law.

Such overreaching applications of the "harm" regulation are commonplace in Travis County. Indeed, according to one environmental consultant, the FWS's development restrictions in Travis County virtually ensure that no real "take" of warblers is even possible.

> "Every Section 10(a) permit and Section 7 biological opinion issued by USFWS that we have seen

[15] *Id.* at 16.

[16] *Id.*

> in the Austin area contains a condition that prohibits clearing of vegetation in areas occupied by warblers during the breeding season. Clearing is limited to those times of year when the birds are out of the country [Aug. 1-Mar. 1], which, needless to say, is a tremendous restriction to homebuilders. This clearing prohibition actually results in no "take" whatsoever . . . . Birds aren't actually physically harmed if trees are cut while they are in Central America . . . . Therefore, USFWS charges a developer with take, liberally delineates habitat to extort costly mitigation, and still finagles it so that no true take actually occurs." [17]

B. The FWS Equates "Taking" Habitat With "Taking" Wildlife.

Agency correspondence such as that quoted above makes it clear that the Secretary routinely conflates the "taking" of habitat with the "taking" of wildlife. As evidenced in the golden-cheeked warbler examples from Travis County, Texas, the FWS routinely uses the number of acres rather than the number of animals to determine "take".

Such regulatory abuses are precisely what the Secretary purportedly meant to avoid by revising the "harm" regulation in 1981. The "purpose of the redefinition was to preclude claims of a Section 9 taking for habitat modification *alone* without any attendant death or injury of the protected wildlife." 46 Fed. Reg. 54,748 (1981).

Yet such FWS claims continue to abound. In 1991, a resident of South Padre Island, Texas, wanted to build a marina for commercial use on his 3.7 acre tract of land. He was required to conduct a biological survey of the property, as piping plovers (a "threatened" species of

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[17] Letter to Ike Sugg, CEI, from S. Paulson, Division Director, SWCA Inc. Environmental Consultants, "U.S. Fish & Wildlife Service Interpretation of the Endangered Species Act in the Austin Area", Mar. 15, 1995, at 7-8.

migratory shorebird) were known to winter in the area. The nine-day survey was conducted in 1992. No plovers were seen on the property, but the consultant did observe "a flock of 18 piping plovers resting on a sand flat adjacent to the project site for a period of 11 minutes." [18]

Based on this observation, the FWS determined that "the project would directly impact 36,355 square feet of tidal flat/algal habitat . . . piping plover feeding and resting areas. . . . This degree of impact, 36,355 square feet spread over the 18 to 19 birds observed in the local flock, is considered to constitute an incidental take." [19] When asked by the Army Corps of Engineers "whether the incidental take identified in the draft biological opinion referred to the taking of habitat or of birds," the FWS Field Supervisor's response was as mysterious as his determination of the "taking":

> "The best possible quantification, given in the *Incidental Take* section, is 6% of the non-roosting habitat required to support a single bird, or, more realistically, the effects of such a loss spread over a flock of 18 to 19 piping plovers." [20]

Thus, based on one 11 minute observation of a flock of birds momentarily resting on another part of the beach, the FWS concluded that building the marina would constitute a "take"—of what, exactly, is rather unclear.

Of course, the "harm" regulation applies not just in Texas but across the entire country. On Washington State's Olympic peninsula, for instance, Anderson & Middleton Logging Co. has been prevented from logging

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[18] Letter to Colonel John P. Basilotto, U.S. Army Corps of Engineers, from Thomas E. Grahl, Acting FWS Field Supervisor, May 23, 1994 (Consultation No. 2-11-92-F-010), at 2.

[19] Grahl Letter, *supra* n.18, at 19, 23.

[20] Grahl Letter, *surpa* n.18, at 5.

timber on a 72 acre tract of private land due to an enforcement action filed against it by the government in December 1993. The reason for this action was that a pair of northern spotted owls were nesting, not on Anderson & Middleton's land, but on government land a full 1.6 miles away from the company's plot. *U.S. v. Anderson & Middleton Logging Co.*, C93-5697R (W.D. Wash. Dec. 9, 1993). A similar fate confronted Betty Orem, who owns 27 acres adjacent to the Olympic National Forest. When she applied for a permit to harvest the timber on her land, the permit was denied because of the existence of a spotted owl over a half mile away on the federal government's land.[21]

Such cases are indistinguishable in principle from the fact situation in *Forest Conservation Council v. Rosboro Lumber Co.*, 92-1114-HO (D. Ore. Nov. 18, 1993). In *Rosboro,* plaintiffs sued under the ESA's citizen suit provision to stop the company from harvesting timber on its own land because it was adjacent to federal land in which a pair of northern spotted owls resided. The court held that "an allegation of a speculative one-time future violation of the ESA which will not result in the extinction of a species is insufficient to establish an actionable taking."

Despite the fact that *Rosboro* was dismissed, it is precisely such "speculative" future effects that the FWS routinely considers to be a "take." Whether the FWS considers them actionable or not is immaterial; its mere assertion of "take," and the risk of criminal prosecution that it brings, is enough to dissuade most landowners from undertaking the costly task of defending their rights in court.

The examples from Texas and the Pacific Northwest also stand in stark contrast to the court holdings that destruction of suitable habitat does not in and of itself

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[21] A. Gidari, "The Endangered Species Act: Impact of Section 9 on Private Landowners," 24 Envtl. L. 419, 439 (1994).

constitute "take." *See, e.g., Morrill v. Lujan,* 802 F. Supp. 424, 430 (S.D. Ala. 1992) Even "scientific evidence supporting the conclusion that current excessive . . . [actions] are impairing essential behavioral patterns is [not] a sufficient basis on which to infer . . . death or injury . . . ." *Swanview v. Turner,* 824 F. Supp. 923, 939 (D. Mont. 1992).

Clearly, recent judicial clarification and narrowing of the regulatory ambit of the "harm" definition have not saved that regulation from abuse. To the contrary, regulatory regimes such as the one implemented in Travis County for the golden-cheeked warbler show that the regulatory definition of "harm" is interpreted liberally and applied expansively, well beyond what the government asserts to be its statutory limits. Thus it is the Secretary, and not the court below, who is postulating constructions that defy the regulation's purportedly narrow language. It is the Secretary who bases his actions on "an extravagant reading and speculative applications of the regulation" (Pet. Br. at 49), not the Court of Appeals.

II. BECAUSE IT DOES NOT REQUIRE ACTION DIRECTED AT, OR PHYSICAL INJURY TO, AN INDIVIDUAL MEMBER OF A LISTED SPECIES, THE GOVERNMENT'S "HARM" DEFINITION IS HOPELESSLY VAGUE AND INHERENTLY INCONSISTENT WITH THE MEANING OF "TAKE."

Even if the Secretary's actual interpretation of "harm" were limited to government's conservative reading of the regulatory definition, that definition is inconsistent with the structure and legislative history of the Act. There is no coherent way in which to interpret the Act's prohibition of "taking" listed species except to construe it as a prohibition against "taking" *individual members of listed species.* Because the Secretary explicitly rejects that construction, the regulation is invalid on its face.

A. "Take" Only Encompasses Actions Directed At Individual Members Of Listed Species.

Section 9 prohibits the "taking" of endangered species. 16 U.S.C. § 1538(a)(1). The ESA defines "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). As is shown below, properly construed, section 9's prohibition of "take" applies only to individual animals.

Admittedly, the wording of the ESA itself confuses this issue by prohibiting the "take of any such species," rather than the individual members of such species. Section 1538(a)(1)(B). Yet it is clear that it is the taking of *individuals* that Section 9 prohibits; otherwise, that same section's prohibition on the importation of, possession, sale, delivery, carry, transport, or shipment of *"any such species"* (section 1538(a)(1)(D)) would be nonsensical. Similarly, it is manifestly impossible to "deliver, receive, carry, transport, or ship" a *species,* just as it is impossible to "sell or offer for sale in interstate commerce or foreign commerce any such species." Section 1538(a)(1)(F).

The only possible way in which one could do such things to or with a listed *species* in violation of Section 9 would be to do them with *each and every extant member of the species,* or with every living member of "any distinct population segment" of a species. 16 U.S.C. § 1532(16). Such a construction of the term "species" would render the prohibitions of Section 9 ludicrously hollow. Thus, since it is implausible to conclude that Congress meant to prohibit only those actions that impact every living member of a listed species, the only reasonable interpretation of Section 9's use of the term "species" is that it refers to *individual members* of listed species. *See also* Section 1532(8).

This same analysis holds for "take." One would be hard-pressed to "harass, pursue, hunt, shoot, wound, kill,

trap, capture, or collect" an entire species. Like the term "harm," all the words defining "take" are verbs that connote actions against individual animals. While Congress may not have been as clear as it could have been in writing the statute, in amending the statute to allow "incidental takings" Congress was not much clearer.

The House Committee describing the exemption process stated: "In order to obtain a permit, the private applicant must present the Secretary with a conservation plan demonstrating that he will minimize the incidental taking, and "*specify the number of species likely to be taken* . . . ."[22]

That the ESA's prohibition of "take" applies only to individual members is clear. "[S]ection 9's threshold does focus on individual members of a protected species." JA 68. Indeed, earlier in the case at bar, even the government acknowledged that the "taking" prohibition "requires evidence of actual physical impacts—killing or injury to wildlife—that is the general focus of Section 9." District Court Docket No. 13 at 21.[23] Ignoring this earlier statement, it now argues that no such physical impacts need be evidenced. Referring to the 1981 redefinition of "harm," the government instead notes approvingly that the Secretary "reaffirmed that 'harm' is not limited 'to direct physical injury to an individual member of the wildlife species.' " JA 67.

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[22] H.R. Rep. No. 567, 97th Cong., 2d Sess. 15, *reprinted in* 1982 U.S.C.C.A.N. 2807, 2831 (emphasis added).

[23] In an attempt to save the "harm" regulation from invalidation, the government added that Section 9 also had an "intent requirement," which, it argued, "vitiates any vagueness concerns." *Id.*, at 18. Because it seems wholly unjust to prosecute a man because an endangered bird flew into his windshield while he was driving his car, we would agree that the ESA's "take" prohibition must have some scienter requirement, which the government's current interpretation of "harm" clearly lacks.

The 1981 redefinition was prompted by *Palila v. Hawaii Department of Land and Natural Resources,* 471 F. Supp. 985 (D. Hawaii 1979), *aff'd,* 639 F.2d 495 (9th Cir. 1981) (*Palila I*). In *Palila I,* habitat modification was deemed a violation of Section 9, "even though no killing or injuring of individual Palilas [birds] was demonstrated." JA 62. The Interior Department's Associate Solicitor determined that the decision in *Palila I* "exceed[ed] the statutory authority conferred by Section 9 of the Act," and recommended that the 1975 definition be redefined. JA 64. Analyzing the ten descriptors of "take" in Section 9, the Associate Solicitor concluded:

> "With the possible exception of 'harm,' these terms all represent forms of conduct that are directed against and likely to injure or kill *individual* wildlife. Under the principle of statutory construction, *ejusdem generis,* where general words accompany words of specific meaning, such general words are construed as applying only to actions of the same class as those specifically mentioned. *Goldsmith v. U.S.,* 42 F.2d 133 (2nd Cir. 1948). Applying this principle to the present construction problem, the term 'harm' should be interpreted to include only those actions that are directed against, and likely to injure or kill, individual wildlife." JA 58.

The agency ultimately abandoned its proposed 1981 redefinition of "harm." The prohibition on habitat "modification or degradation" that impairs "essential behavioral patterns" was reinstated. 50 C.F.R. § 17.3. The FWS rejected limiting "harm" to "direct physical injury to an individual member of the wildlife species," as "[t]his was not the intent of the Service." JA 67. Notwithstanding this requirement—that the prohibited act be directed *against* wildlife—the government's rejection of the injury-to-individuals limitation, by itself, renders the current "harm" regulation invalid.

B. The Secretary's Interpretation Of "Harm" Results In Vague And Vast Regulation, And Relies On Scientific Theories That Congress Was Unaware Of In 1973 And Which Courts Have Since Rejected As Insufficient Grounds On Which To Establish "Take."

For all the government's emphasis on the purported limitations of "actual death or injury," that phrase can only mean direct physical injury to an individual animal. Even though death seems to fit no other construction, the FWS nevertheless rejects that standard. Barring psychological injury to individual wildlife, which could never be plausibly proven (or disproven), it is clear that the government believes that some indirect injury to the *species* constitutes "harm." Yet this construction violates both the maxims *ejusdem generis* and *noscitur a sociis*, as none of the other terms defining "take" are so broadly construed as to encompass either indirect actions or injuries to species (and would make little sense if they were).

The government defines "harm" to embrace indirect injuries to the species, rather than only direct injuries to individual members of the species. It insists that "Congress intended to create a definition of take which included all of the various ways of killing or injuring protected wildlife." JA 68. But since "taking" a *species* is as illogical as selling or transporting a species, the accepted maxims of construction dictate that "harm" must also focus on individuals.

Not only would construing "harm" in this way be more consistent with the other nine descriptors of "take," it would also avoid the problem of surplusage identified by the court below. Pet. App. 25a. A construction of harm that was limited to actions directed against individual wildlife would, for instance, prohibit poisoning wildlife, including instances where the effects of poisoning were not lethal. It is significant that "harm" is the

only one of the ten descriptors of "take" that would prohibit non-lethal poisoning.

Instead of embracing this standard, the government relies on a Senate Committee report defining "take" in "the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." *See* S. Rep. No. 307, 93d Cong., 1st Sess. 7 (1973). Yet this statement is circular, tantamount to "take means take," and thus adds nothing. *See* Pet. App. 71a. Moreover, this statement was made well before "harm" was even added to the statutory definition of "take," and is thus irrelevant to the issue of habitat modification at bar.

As Judge Sentelle pointed out in his dissent in the panel decision below, the FWS's exclusive focus on the effect of "harm" makes the other words in Section 9's definition of "take" superfluous. *Id.* at 71a-72a. If the government's habitat-modification-as-"harm" construction is not limited to physical harm to individual members of species, then subsection 7(a)(2)'s explicit prohibition on "adverse modification of habitat" as applied to actions with a federal nexus becomes surplusage. To avoid this problem, the government is forced to contradict its general argument and acknowledge that Section 9 necessitates "taking" individuals, and thus "a particular action may cause a taking of individual members of a listed species, but not adversely affect the species as a whole to such an extent that it violates the 'jeopardy' prohibition or critical habitat restrictions in Section 7(a)(2)." Pet. Br. 42.

The government's differentiation of Section 9's focus on individual wildlife from Section 7's focus on the species as a whole is correct, but it is inconsistent with the government's incorrect argument that "harm" does not require proof of "direct physical injury to an individual member" of a species. Pet. Br. 6, 15. The FWS rejected such proof in promulgating the 1981 regulation,

thus compelling the government to defend that rejection in order to save its regulation.

Rejecting proof of "direct physical injury to an individual member" of a listed species renders the "harm" regulation hopelessly vague. As the Environmental Defense Fund's Michael Bean has observed: "The problem is that it is impossible for most landowners to translate [the 'harm' definition] into clear and readily understandable rules regarding what they can or cannot do on their property." M. Bean, *Reconciling Conflicts Under the Endangered Species Act* 43 (1991). The government's rejection of such proof also leads to applications of the "harm" regulation that defy any reasonable standard of permissible construction.

As evidenced by applications of the "harm" regulation in Travis County, Texas, the FWS's policy is to prohibit all habitat modification in suitable habitat during the entire period that golden-cheeked warblers are known to frequent the state. "Incidental takings" are allowed only when the warblers have migrated to Mexico and Central America. *See* text accompanying n.17, above. Thus, no individual warblers could possibly be "taken," incidentally or otherwise, under the FWS's implementation of "harm" in Texas. And yet, the FWS routinely requires exorbitant "mitigation" for "incidental takings."

No matter how "significant" or insignificant the habitat modification might be, the only "behavioral patterns" impaired are those of non-existent animals. Perhaps the best example of this pertains to the black-capped vireo, which is similar to the warbler in that they both spend the spring in Texas and both are neotropical migratory songbirds.

Westview Development, Inc. wanted to build some homes on Davenport Ranch, a property owned by the company. Westview had already donated 74 acres of prime vireo habitat to a local preserve, and entered another 62 acres in a conservation easement that precluded

development. The FWS informed Westview that the development would directly "take" 22 acres of vireo habitat and, as a result of a 200 foot "buffer" zone of impact around the modification, another 10 acres would be "taken" indirectly. To "mitigate" for this 32 acre "taking," Westview was informed that it would have to purchase and manage a 100 to 500 acre vireo preserve.[24]

The FWS advanced two theories for this calculation: (1) "The 'take' analysis for the proposed development is based upon the acres of habitat lost rather than the number of territories . . . therefore, discussion of a specific territory is not directly related to the analysis." [25] Hedging against the illegality of this analysis, the FWS advanced another theory: (2) Modifying habitat when no vireos were even in the state would "take" two pairs and several generations of offspring. In effect, by the agency's logic the same animal can be taken more than once, and the wildlife purportedly "taken" need not even yet exist!

The FWS calculated that the reproductive potential for vireos averages one offspring per female, per breeding season. Based on its belief that two existing pairs of vireos would be "taken," the agency assumed that each pair would bear five to seven young. The FWS then calculated how many offspring the young would have. The result was a "loss of from 50 to 126 vireos. Using the figure that a vireo territory generally ranges from two to four acres, the land that would have to be purchased would range from 100 to 504 acres." [26]

No proof of such "taking" could be offered, as no vireos could be physically injured while they were hundreds or thousands of miles away from the development site. Yet even if development were allowed during the vireo's brief sojourn in Texas, there still was no proof

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[24] Letter to J.B. Ruhl from Sam. D. Hamilton, FWS State Administrator, at 6 (Oct. 28, 1993).

[25] *Id.* at 2.

[26] *Id.* at 5-6.

that any members of the species would be actually harmed. We submit as a matter of simple logic that future progeny cannot be "taken" until they come into being. Thus only two pairs could possibly be "taken" on Davenport Ranch. According to the FWS, those four vireos were "taken" because habitat suitable for their use would be modified.

The inescapable conclusion to draw from this and other such examples is that the government's "harm"-by-habitat-modification definition requires no real proof of "actual death or injury." The inclusion of "habitat modification" and "essential behavioral patterns" allows the FWS to deem any loss of potential habitat a "take." The presumption is either: (1) members of listed species will not be able to express behavior there once the habitat is modified; (2) the process of modification will impair the behavioral patterns of (and somehow injuring) individuals beyond the perimeter of the modification; or (3) the species as a whole will suffer lost reproduction and habitat in which future generations could disperse.

All of these presumptions are based on theories from conservation biology that did not come into existence until well after the ESA was enacted. Not until Mark Shaffer published his pioneering work on "population viability analysis" (PVA) in 1981 did conservation biologists have any scientific basis whatsoever for claiming that habitat fragmentation could be predicted to result in the loss of existing wildlife. *See* C. Mann and M. Plummer, *Noah's Choice: The Future of Endangered Species* 191 (1995).

Before that time, biologists had little more than the "species-area curve," which merely predicts that the number of species is proportional to the amount of available habitat. As implied in the amicus brief of scientists in support of the government, the very best species-area curve analyses cannot tell a scientist *which* species will be imperiled by habitat loss, let alone which individual animals. Perhaps that is why the scientists found "harm's"

requirement of direct injury to individual wildlife was "the most troubling aspect, from a scientific point of view." Brief of Amici Curiae Scientists John Cairns, Jr. *et al.* at 22.

According to its progenitor, Mark Shaffer, even the cutting-edge science of population viability analysis is inexact at best. "The life characteristics of fewer than a dozen species are known well enough to be used in these models." Moreover, says Dr. Shaffer, "I don't think anyone has looked at PVAs, seen the kind of data they require, and then gathered it—still less directly tested one." *Id.* at 193. Yet such models were relied on heavily in the case of the warblers and vireos in Texas (Mann and Plummer at 193-198), and served as the apparent basis for much if not all of the FWS's "harm"-by-habitat-modification determinations in Travis County.

Most courts have rejected the application of conservation biology's speculative theories to decisive questions of wildlife law. A. Gidari, *supra* n.21 at 423 (1994). As the First Circuit has found, the "proper standard for establishing a taking under the ESA, far from being a numerical probability of harm, has been unequivocally defined as a showing of 'actual harm.'" *American Bald Eagle* v. *Bhatti*, 9 F.3d 163, 165-166 (1st Cir. 1993). But the *de facto* biology-as-law standard informed by population viability analysis, and established by the government's "harm" regulation, leads inexorably to such numerical standards because it rejects the "direct physical injury" standard.

III. IN CONTRAVENTION OF THE ACT'S REVEALED DESIGN, THE REGULATORY DEFINITION OF "HARM" FACILITATES THE ILLEGAL IMPOSITION OF FEDERAL DUTIES ONTO PRIVATE LANDOWNERS

What becomes clear from reading agency correspondence to private landowners is that the FWS is using the "harm" regulation to impose the burden of "conserving"

wildlife onto the private sector. "Conserve" is defined in the Act as "the use of all methods and procedures which are necessary to bring any endangered species to the point at which the measures provided pursuant to this Chapter are no longer necessary." 16 U.S.C. § 1532(3). Yet the Act explicitly makes the duty to conserve that of the government, not the duty of private landowners or other nonfederal entities. 16 U.S.C. §§ 1531(c)(1), 1536(a).

The government and its supporting *amici* also conflate the duty to conserve with the obligation not to "take," as they argue repeatedly (Pet. Br. at 4, 18, 24) that Section 2 somehow supports the government's interpretation of "harm." The section on which they rely states that the Act's purpose is "to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved." 16 U.S.C. § 1531(b). Yet the very next provision specifically assigns that duty to *federal agencies*: "It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve" listed species. Section 1531(c)(1).

As the language and structure of the Act make clear, the purpose of "conserving" wildlife is to recover them, to bring them to the point at which they no longer warrant the Act's protections. The government argues that its interpretation of "harm" does not prohibit habitat modification "that merely retards recovery". Pet. Br. 41. As shown below, however, this argument is untenable.

As revealed in Texas and elsewhere, the government's liberal interpretation of "harm" in the field lacks any showing of physical injury to individual animals. Not one of the examples cited above was predicated on a stated belief that the habitat modification in question would *prevent* recovery, let alone result in the species' extinction. The implicit basis for those determinations of "take" was that the habitat modifications would inhibit recovery.

Indeed, the regulatory definition itself includes the impairment of "essential behavioral patterns, including breeding, feeding or sheltering." Thus, habitat modification that indirectly decreases the reproductive success of just one member of a listed species can constitute a "take" under the most conservative interpretation of the government's definition of "harm." Simple logic dictates that a decrease in "breeding" necessarily "retards recovery."

In *Palila II*, the Ninth Circuit's interpretation of the government's "harm" regulation was unclear as to whether actions that retard or prevent recovery constitute "harm," but explicitly endorsed the interpretation that "harm" prohibits actions that might cause population declines. *Palila v. Hawaii Dep't of Land & Natural Resources*, 852 F.2d 1106 (9th Cir. 1988) (*Palila II*). It is through this and other such interpretations of the government's "harm" regulation that the habitat modification provisions of Section 7 have been effectively transposed onto private landowners through Section 9.

The government's various theories of what constitutes "actual death or injury" within the meaning of "harm" result in *de facto* interpretations of the "harm" regulation that are the functional equivalent of federal agencies' responsibility under Section 7 to not "jeopardize the continued existence of" listed species. 16 U.S.C. § 1536(a)(2). The administrative definition of "jeopardy" prohibits actions that "would be expected to reduce the reproduction, numbers, or distribution of a listed species to such an extent as to appreciably reduce the likelihood of the survival of that species." 50 C.F.R. § 402.2 (1981).

It should therefore come as no surprise that less than $254 million has been spent to purchase 359,755 acres for endangered species protection under the acquisition authority of 16 U.S.C. § 1534. Scientists' Amicus Br. 18. This, despite the fact that "the major change made by

the 1973 Act was the removal of all dollar limitations on the expenditure of money from the Land and Water Conservation Fund for acquisition. . . ." M. Bean, *The Evolution of National Wildlife Law* 402 (1977). This is a paltry sum, given that $18.213 *billion* went into the fund since 1965, of which sum Congress appropriated $8.541 billion to the Secretary to spend on acquisition.[27]

Nor is habitat being protected through Section 7 "critical habitat" designations, as such habitat has been officially designated for only 83 out of the nearly 1,000 listed species. Brief Amicus Curiae of National Wildlife Federation 26. This is not to say that habitat is not being protected. However, what these statistics suggest is that habitat is being protected through provisions other than those contained within Sections 5 and 7. We submit that it is through Section 9's "harm" definition that habitat is actually, and improperly, being protected under current FWS practice.

The regulatory definition of "harm" has also led to the legally questionable conditioning of "incidental take" permits on expansively wrought habitat conservation plans. *See, e.g.*, J.B. Ruhl, *Regional Habitat Conservation Planning Under the Endangered Species Act: Pushing the Legal and Practical Limits of Species Protection*, 44 S.W.L.J. 1393, 1402 (1991). Exceeding the authority vested in Section 10(a) creates *de facto* "critical habitat" without benefit of the statutory protections for designating such habitat, including notice-and-comment rulemaking and a consideration of the relevant economic impacts of such a designation. Section 1533(b)(2).

Finally, the fact that more than 44 million acres of

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[27] A. Teter, "Land and Water Conservation Fund Receipts, Appropriations and Unappropriated Balances Reported by Treasury Department," National Park Service Office of Budget (Feb. 27, 1995); A. Teter, "Appropriations from the Land and Water Conservation Fund," National Park Service Office of Budget (Mar. 14, 1994).

land are currently included within the FWS's roster of habitat conservation plans indicates that the FWS is abusing its authority to prohibit "takings" while allowing "incidental takings".[28]

In short, the government has done precisely what it claimed in 1981 could not be done—it has "convert[ed] section 9 into a habitat protection provision" even though that is exclusively "the purpose of sections 5 and 7 of the Act." JA 69.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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[28] *See* FWS, *Status of Habitat Conservation Plans* (Feb. 23, 1995). Copies of this document have been lodged with the Clerk of the Court.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, ET AL., RESPONDENTS

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BRIEF AMICUS CURIAE OF THE AMERICAN FARM BUREAU FEDERATION, CALIFORNIA FARM BUREAU FEDERATION, OREGON FARM BUREAU FEDERATION, AND TEXAS FARM BUREAU IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

Amici will address the following questions:

1. Whether ordinary principles of statutory construction show that "harm" in section 3(19) of the Endangered Species Act does not encompass habitat modification.

2. Whether the Fish and Wildlife Service's regulation construing "harm" to encompass habitat modification imposes an intolerable burden on farmers, ranchers, and other landowners never intended by Congress.

3. Whether the Fish and Wildlife Service's regulation results in Fifth Amendment takings of private property that clearly were not contemplated by Congress when it enacted the Endangered Species Act.

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No. 94-859

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BRIEF AMICUS CURIAE OF THE AMERICAN FARM BUREAU FEDERATION, CALIFORNIA FARM BUREAU FEDERATION, OREGON FARM BUREAU FEDERATION, AND TEXAS FARM BUREAU IN SUPPORT OF RESPONDENTS*

INTERESTS OF THE AMICI CURIAE

The American Farm Bureau Federation (AFBF) is a voluntary general farm organization organized in 1920 under the General Not-For-Profit Corporation Act of the State of Illinois. AFBF was founded to protect, promote, and represent the business, economic, social and educational interests of American farmers and ranchers. AFBF has member organizations in all 50 states and Puerto Rico

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* Consents to the filing of this brief are on file with the Clerk.

representing more than 4.4 million member families. Amici California, Oregon, and Texas Farm Bureaus are members of AFBF, representing the interests of farmers and ranchers in their respective states.

AFBF and the state Farm Bureau amici have a direct interest in the outcome of this case. Their farmer and rancher members own or lease significant amounts of property, on which they depend for their livelihoods and upon which all Americans rely for food and other basic necessities. Amici's members' use of their land has been severely restricted by the Fish and Wildlife Service's interpretation of section 9 of the Endangered Species Act to encompass ordinary, everyday farming and ranching activities as prohibited "habitat modification." That unduly broad interpretation rewrites the Act to make potential criminals of vast numbers of families engaged in agriculture and ranching activities, prohibiting well-accepted agricultural practices and creating uncertainties about permissible conduct that chill the most productive and beneficial use of land.

In consequence, amici have a strong interest in affirmance of the court of appeals' ruling that the Act does not authorize FWS's regulatory definition of "harm" to include habitat modification on private land. We believe that amici's experiences with the operation of the regulation at issue—a regulation that has had an especially deleterious impact in those states whose farmers and ranchers are represented by the state Farm Bureau amici—will be helpful to this Court in reaching a decision.

SUMMARY OF ARGUMENT

1. Section 9 of the Endangered Species Act ("ESA") forbids any person to "take" a member of any of hundreds of "endangered" or "threatened" species of animals and birds (known as "listed" species). 16 U.S.C. § 1538(a)(1). Congress defined "take" in section 3(19) to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" a

member of a listed species, or to attempt to do so. 16 U.S.C. § 1532(19). The standard tools of statutory interpretation used by this Court uniformly point to one, clear meaning for this provision: persons are prohibited from conduct directed at wildlife that will kill, physically hurt, or reduce to captivity a member of a protected species. FWS's regulation defining the term "harm" much more broadly to include "habitat modification" that impairs breeding, feeding, or sheltering behavior (50 C.F.R. § 17.3)—*e.g.*, normal land use activity that disturbs or destroys a single nesting site, food plant, or burrow—vastly expands the Act's prohibitions without any congressional authority and was correctly struck down by the court of appeals.

2. The severe adverse practical impact of FWS's regulation on the ordinary, productive use of private property is strong evidence that the agency has expanded the reach of the Act far beyond what Congress intended. There is absolutely no indication that Congress thought it was enacting in section 9 of the ESA a general, nationwide land use statute of enormous consequence for the owners of hundreds of millions of acres of private land—one that would micro-manage such actions as clearing brush and plowing fields. Nor is there the least indication that Congress intended to make criminals of farmers and ranchers who in the course of working their land impact future generations of listed species in ways that only a biologist could predict.

3. FWS's view that "harm" includes habitat modification is belied as well by the Fifth Amendment consequences of that definition. In turning section 9 of the ESA into a substantial, pervasive restriction on the productive use of private land, FWS threatens to impose a significant burden on the public fisc in the form of payments of compensation to landowners mandated by the Takings Clause. That Congress clearly did not envisage the imposition of such costs by section 9 further demonstrates the utter implausibility of FWS's interpretation of "harm."

ARGUMENT

Executive branch agencies are to apply statutes, not author them. The Fish and Wildlife Service has violated this most basic principle. It has adopted a regulation—creating a new crime of habitat modification, punishable by a year in prison and a substantial fine—that flatly contradicts the intent of Congress as determined using any of the methods of statutory interpretation endorsed in this Court's precedents. Because FWS's definition of "harm" to include habitat modification is at odds with the clear meaning of the Endangered Species Act, the court of appeals' judgment striking it down should be affirmed.

Much is at stake here. FWS's regulation is preventing farmers from farming effectively, ranchers from ranching effectively, and many other landowners from enjoying the full entitlements of property ownership. Congress envisaged no such consequences when it enacted and amended the ESA. Moreover, the regulatory transformation of the ESA into a national land use code has serious constitutional ramifications. The founders of our polity built protection of private property rights into the framework of our fundamental law. They would be aghast to learn that unelected administrators have converted the plowing of fields and the clearing of trees on private land into federal crimes. Indeed, the Takings Clause of our Constitution requires that such abridgements of fundamental individual rights be justly compensated.

I. CONGRESS DID NOT AUTHORIZE FWS'S HABITAT MODIFICATION RESTRICTIONS

A. Standard Principles Of Statutory Construction Require That The Term "Harm" Not Be Construed To Include Habitat Modification

This case hinges on whether the term "harm," as it appears in section 3(19)'s definition of "take," plausibly encompasses habitat modification. It does not. Amici agree with and will not repeat respondents' full and careful analysis

of the statute and its legislative history. However, a few well-accepted principles of statutory interpretation seem to us particularly compelling in showing that FWS's broad definition of "harm" impermissibly "goes beyond the scope of whatever ambiguity [section 3(19)] contains." *Chicago* v. *Environmental Defense Fund*, 114 S. Ct. 1588, 1594 (1994).

First, Congress well understood how to say "habitat modification" when that was what it intended. Congress mandated that in determining species to be listed, the Department of Interior should consider the "*destruction, modification, or curtailment of [a creature's] habitat.*" 16 U.S.C. § 1533(a)(1)(A). ESA section 7 specifically requires that federal agencies "insure that any action authorized, funded, or carried out by such agency * * * is not likely to * * * *result in the destruction or adverse modification of habitat of [a listed] species* which is determined by the Secretary * * * to be critical." *Id.* § 1536(a)(2). And section 7 also requires conferral between the Secretary and an agency about "an agency action which is likely to * * * *result in the destruction or adverse modification of critical habitat*" proposed to be designated for a listed species. *Id.* § 1536(a)(4).

No such words or phrases appear anywhere in the "take" provisions of the statute, as they surely would if Congress had intended that section 9 should reach habitat modification. *Keene Corp.* v. *United States*, 113 S. Ct. 2035, 2040 (1993) ("'[W]here Congress includes particular language in one section of a statute but omits it in another * * *, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'"); see also *Central Bank* v. *First Interstate Bank*, 114 S. Ct. 1439, 1448 (1994) ("Congress knew how to impose aiding and abetting liability when it chose to do so. [Citing statutes expressly creating aiding and abetting liability.] If * * * Congress intended to impose aiding and abetting liability, we presume it would have used the words 'aid' and 'abet' in the statutory

text"); *Chicago* v. *Environmental Defense Fund*, 114 S. Ct. at 1593; *Pinter* v. *Dahl*, 486 U.S. 622, 650 (1988). In light of the very different language used in different parts of the statute, the court of appeals correctly found that only section 7 of the Act, imposing obligations on the federal government but not private parties, together with section 5, which authorizes federal acquisition of land to protect habitat, are directed to habitat modification. 17 F.3d at 1466.[1]

Second, not only is the phrase "destruction or adverse modification of habitat" starkly absent from sections 9 and 3(19), but everything about the statutory definition of "take" conspires against FWS's position. The defined term—"take"—must be the starting point for understanding the import of the section 3(19) definition, and it cannot be stretched to encompass habitat modification. Not one of the definitions of "take" given in the 17 pages devoted to this elemental word in the Oxford English Dictionary comes close to the sort of incidental, otherwise-directed activity prohibited by FWS's regulation. To the contrary, the active verb in its primary meanings evokes precisely the sense of an activity directed to killing, hurting, or reducing a creature to captivity. See Oxford English Dictionary 558 (2d ed. 1989) (defining "take" as "[t]o seize, grasp, capture, catch"; "To lay hold upon"; "To catch, capture (a wild beast, bird, fish etc.)"; "To strike, hit, impinge upon").

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[1] Congress would hardly have bothered to enact elaborate provisions governing the designation and protection of "critical habitats" by federal agencies if "habitat modification" were generally prohibited, on federal and private land, by section 9. Interpretation is "'not [to] be guided by a single sentence or member of a sentence, but * * * [by] the provisions of the whole law.'" *Gade* v. *National Solid Wastes Management Ass'n*, 112 S. Ct. 2374, 2383-2384 (1992). FWS's definition of "harm" fails that test by rendering the "critical habitat" scheme largely otiose.

The more specific words listed in the section 3(19) definition reflect these meanings: pursue, hunt, shoot, wound, kill, trap, capture, collect. The general words that begin the definition must be read to conform to these specific words as well as to the common meaning of "take." See *Dole* v. *United Steelworkers of America*, 494 U.S. 26, 36 (1990) ("words grouped in a list should be given related meaning"); *Massachusetts* v. *Morash*, 490 U.S. 107, 114 (1989). Otherwise—as FWS's regulation perfectly illustrates—one word in a list may obtain "a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.'" *Gustafson* v. *Alloyd Co.*, No. 93-404, slip op. at 13 (U.S. Feb. 28, 1995). FWS's regulation ignores these principles and gives "harm" a meaning essentially unrelated to either the term defined or the more specific words used to illuminate that term. That cannot be right.

In our view, these straightforward precepts, which have long guided this Court in its interpretation of statutes, should be the end of this case: they point to affirmance. The practical and constitutional implications of FWS's overbroad definition of "harm," discussed below, nevertheless serve to confirm our conclusion that "habitat modification" on private land lies outside section 9's reach. See *Public Citizen* v. *United States Dept. of Justice*, 491 U.S. 440, 454 (1989) ("'unreasonable to believe'" that Congress intended "'absurd results which follow from giving * * * broad meaning to [statutory] words'"); *United States* v. *Bryan*, 339 U.S. 323, 338 (1950) ("Court will not reach * * * result if it is contrary to the congressional intent and leads to absurd conclusions"); *United States* v. *X-Citement Video, Inc.*, 115 S. Ct. 464, 470 (1994) ("we do not impute to Congress an intent to pass legislation that is inconsistent with the Constitution").

B. Congress Has Not Ratified FWS's Erroneous Expansion Of "Harm" To Encompass Habitat Modification

Contrary to petitioners' assertions, the 1978 and 1982 Congresses plainly did not acquiesce in or ratify FWS's interpretation of "take" to encompass habitat modification: the amendments to ESA that they passed addressed neither the prohibition of a "take" in § 9(a)(1) nor the definition of a "take" in § 3(19). See *Zuber* v. *Allen*, 396 U.S. 168, 185 n.21 (1969) ("Where * * * there is no indication that a subsequent Congress has addressed itself to the particular problem, we are unpersuaded that silence is tantamount to acquiescence, let alone * * * approval"). Rather, the amendments added new sections to the Act that provided not for a broadening of liability, but for a narrowing of liability through exemption and permit procedures. 16 U.S.C. §§ 1536(e)-(o), 1539(a). See *NLRB* v. *Health Care & Retirement Corp.*, 114 S. Ct. 1778, 1784 (1994) (finding history of legislation amending other sections of a statute not determinative of congressional intent with regard to statutory section at issue). Congress *could* have amended section 9 specifically to target habitat modification, but did not do so.

FWS resorts to a far-fetched reading of the incidental take amendment as Congress's silent incorporation of the ban on habitat modification devised by the agency. But such a reading defies the plain meaning of the provision. Allowing a permit for a taking "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity" (§ 1539(a)(1)(B)) simply creates a procedure to remove liability for nonpurposive "takes"—for example, the tripping of a trap set for a non-listed animal, or the ingestion of poisoned bait laid for non-listed pests, by a member of a protected species. The provision says not a word about broadening the meaning of "take" or "harm."[2] In these

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[2] There is no evidence that in 1978 or 1982 Congress was aware

circumstances, passage of the 1978 and 1982 amendments to ESA is essentially irrelevant to the question whether "take" and "harm" include habitat modification.

FWS is thus reduced to arguing that Congress's failure to *reverse* the agency's "harm" regulation, in particular when it passed the 1978 and 1982 amendments to ESA, constituted "congressional ratification" of FWS's interpretation. Pet. Br. 40. But "'where the law is plain,'" as it is here (see pages 4-7, *supra*), it is well established that "'subsequent reenactment does not constitute an adoption of a previous administrative construction.'" *Brown* v. *Gardner*, 115 S. Ct. 552, 556 (1994). Mere reenactment (or amendment of other provisions of a law) amounts to no more than "[c]ongressional silence," which "'lacks persuasive significance,' particularly where administrative regulations are inconsistent with the controlling statute." *Ibid.* And even if the text were not unambiguous, "congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent," as is the case here. *Burns* v. *United States*, 501 U.S. 129, 136 (1991).

Indeed, petitioners' elevation of congressional silence into a legislative mandate raises serious constitutional concerns. The Constitution prescribes very specific requisites for making law; clearly, "'[c]ongressional inaction cannot

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of or sought to address the question of habitat modification in the section 9 context *at all*. This is not a case where Congress defeated a provision "specifically designed to supplant" a contested agency interpretation (*United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985)) or where "its prolonged and acute awareness" of the controversy allowed for a possible imputation of acquiescence. *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 601 (1983); see also *CBS, Inc.* v. *FCC*, 453 U.S. 367, 383-384 (1981) (Congress was repeatedly "made aware" of objections and repeatedly rejected "specific proposals" to repeal offending provision).

amend a duly enacted statute.'" *Central Bank*, 114 S. Ct. at 1453. Yet in contending that congressional inaction has validated FWS's vast expansion of the statute's prohibitions, that is precisely petitioners' position. In effect, FWS interprets Congress's inaction as a silent delegation to the agency to construe "take" broadly. But standardless delegation to executive agencies violates the principle of separation of powers (see *Industrial Union Dept.* v. *American Petroleum Inst.*, 448 U.S. 607 (1980)), and silent delegation, which is inherently standardless, offends all the more.

Furthermore, there is simply no rational means to determine what, if anything, Congress intended by not amending the ESA "take" and "harm" provisions. Failure to overturn an agency interpretation of a statute "'lacks persuasive significance because several equally tenable inferences may be drawn from such inaction.'" *Central Bank*, 114 S. Ct. at 1453, quoting *PBGC* v. *LTV Corp.*, 496 U.S. 633, 650 (1990). In fact, failure to eliminate an offending interpretation by amendment may not signify anything substantive at all, but rather only "unawareness, preoccupation, or paralysis." *Zuber*, 396 U.S. at 185 n.21. See Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 204 n.90 (1983) (congressional rejections of efforts to change administrative interpretations may be due to "tactical or political," rather than "substantive," reasons). Here, congressional intent is particularly unfathomable because Congress was doubly silent. FWS focuses only on Congress's failure to override its regulation, ignoring Congress's simultaneous failure to add habitat modification to the definition of "take." Any attempt to decipher the "true" meaning of this tangle of nonevents would necessarily be a speculative enterprise.

Certainly, FWS's offering of a few snippets of testimony before a congressional subcommittee cannot impart meaning to Congress's inaction. In *SEC v. Sloan*, 436 U.S. 103 (1978), this Court invalidated an agency's interpretation of

a statute where, after testimony at committee hearings concerning the offending interpretation and public approval of that testimony by a committee member, Congress reenacted the statutory provision at issue without amendment. *Id.* at 119-120. This Court ruled that such "isolated statements" do not demonstrate "widespread congressional awareness" and are "not sufficient" to show acquiescence in the agency's interpretation. *Id.* at 121. See also *Health Care & Retirement Corp.*, 114 S. Ct. at 1784 ("isolated statement" in committee report is not "an authoritative interpretation" of congressional intent). FWS offers no more here.[3]

FWS's focus on the inaction of the 1978 and 1982 Congresses is particularly misplaced because "'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Waterman Steamship Corp.* v. *United States*, 381 U.S. 252, 269 (1965). Even if subsequent Congresses could be deemed to have acquiesced in FWS's interpretation, this is "scarcely the sort of congressional approval" of an agency interpretation that is entitled to any weight. *Sloan*, 436 U.S. at 121; see also Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into "Speculative Unrealities"*, 64 B.U. L. Rev. 737, 754 (1984) ("the silent acquiescence of a subsequent Congress should be accorded no weight by the courts in the

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[3] Petitioners' effort to extract significance from silence is analogous to the media's apparently incurable ascription of meaning to this Court's denials of certiorari. See *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 919 (1950) (Frankfurter, J.) ("this court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review"). Indeed, attributing meaning to congressional silence is even less defensible because, in contrast to members of this Court, who have the benefit of argument on substantive issues made in the petition for certiorari, most members of Congress are not even aware of amendments that go unadopted in committee.

search for legislative intent"). In short, the meaning of sections 9 and 3(19) must be determined from the text and the intent of the Congress that enacted these provisions—a test on which petitioners cannot prevail.

II. FWS'S CONSTRUCTION OF ESA SECTION 9 TO ENCOMPASS HABITAT MODIFICATION HAS A SEVERE ADVERSE IMPACT ON FARMERS AND OTHER PROPERTY OWNERS

FWS's construction of the term "harm" to include "habitat modification" on private land—a concept with a vast reach into the most ordinary uses of private property—has an enormous impact on farmers and ranchers, who depend on the land for their livelihoods, and indeed on all Americans, who rely on the fruits of the land for food and other basic needs. The legislative record contains not a hint that Congress intended the sort of dire practical consequences that flow from FWS's regulation.

Under FWS's approach, restrictions on the use of private land are pervasive. There are presently over 800 listed species, of which over 78 percent have habitat on private lands. Moreover, habitat for 80 of the 105 species for which critical habitat has been designated is found on nonfederal lands. Government Accounting Office, *Endangered Species Act: Information on Species Protection on Nonfederal Lands* 4-6 (Jan. 20, 1995) ("*GAO Report*"). Some 2,450 counties—making up almost 90 percent of the continental United States—are home to at least one endangered species. C. Mann & M. Plummer, *Noah's Choice: The Future of Endangered Species* 14 (1995). 210 million Americans live in the vicinity of at least one listed species. *Id.* at 15.

The effect of FWS's regulation is thus to prevent commonplace land use activity on vast stretches of private property. Applying it to the spotted owl, for example, FWS has since 1990 established owl circles radiating up to almost two miles from each nest, in which almost half the land must

be left untouched. Pryne, *Clinton Plan for Logging Gets Split Reception*, Seattle Times, Dec. 11, 1993, at A12. Within a year of being instituted, the owl circles foreclosed to logging an area the size of Massachusetts and Vermont. McCoy, *U.S. Will Designate 11.6 Million Acres in Northwest to Protect Owls, Tall Trees*, Wall St. J., Apr. 29, 1991, at A8. In Washington alone, owl circles preclude foresting on over half a million acres. *FWS Announces New Owl Rules*, BNA State Envt. Daily, Feb. 8. 1995, at 1. The loss of tens of thousands of logging-related jobs is the result. McCoy, *supra*.[4] Although the adverse impact of owl circles on logging lands may be the best known effect of FWS's habitat modification rule, FWS's depredations of private property reach well beyond the forests and into the agricultural heartland of this country.

Nothing in the legislative history of the Endangered Species Act indicates that Congress intended the Act to plunge farmers and other landowners into a struggle for economic survival. Yet that will be the effect of criminalizing habitat modification. Horror stories from all over the country are accumulating rapidly.

- In California, a Taiwanese immigrant invested almost $2 million for desert scrub on which to grow Chinese vegetables. Because of the alleged presence of three listed kangaroo rats, a battalion of two dozen armed state and federal agents, accompanied by helicopters, descended on his farm, seized his tractor and other equipment, and charged him with three counts of criminal destruction of habitat. Arax, *Immigrant Farmer's Woes Galvanize Conservatives*,

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[4] Although the Clinton administration's new forest management plan for the Pacific Northwest may affect some of these figures, its application is limited to federal lands and thus has no bearing on the private property rights at issue in this lawsuit. See Conner, *Judge Rejects Challenges to Federal Logging Plan*, L.A. Times, Dec. 22, 1994, at A3.

L.A. Times, June 10, 1994, at A1; see also *id.*, Jan. 18, 1995, at A1.

- FWS sent a letter to over 500 landowners in Polk and Highlands Counties, Florida, warning them not to destroy any "scrub habitat" on their property, allegedly frequented by the listed Florida scrub jay. Only after a public outcry did FWS back off from this heavy-handed effort to prevent the most routine and necessary type of land clearance.

- George Foote, a 74-year-old Texas landowner, cannot sell his land to obtain needed retirement money because it may be habitat for the golden-cheeked warbler. "That leaves me with land that has no value," he complains, "unless I want to lie to prospective buyers, and that's certainly not the thing to do." Warren, *Rural Land Owners Say Pain Goes Beyond Data*, Wall St. J. (Texas ed.), Dec. 21, 1994, at 1.

- C.D. Barrett, North Carolina Tree Farmer of the Year in 1989, could not sell his timber in 1992 because officials had identified an old cavity in one tree that had once been used by a red cockaded woodpecker. Although the nest was abandoned, it took Mr. Barrett over six months to obtain a clearance letter from FWS, the delay preventing him from selling timber during that period and compelling him to suffer a substantial financial loss. See *The Endangered Gremlins Act*, Wall St. J., June 3, 1994, at A14.

- In southern California, Native Americans were prevented from farming their fields because the listed Stephens kangaroo rat had been found on their reservation. Comment, *The Endangered Species Act: Inadequate Species Protection in the Wake of the Destruction of Property Rights*, 55 Ohio St. L.J. 453, 453 (1994).

- The Stephens kangaroo rat also prevented residents of Riverside County, California, from plowing their fields or clearing their land because they were in a 79,000-acre area

designated for study of the endangered rodent. (For example, in 1990 FWS ordered fifth-generation farmers Cindy and Andy Domenigoni to cease tillage of half their 1600 tillable acres, costing them an average $70,000 in lost crops sales for each of four years, plus an additional $100,000 in biological consultation and legal fees.) When the resultant thick growth in vegetation caught fire in 1993, many Riverside landowners faced the hobson's choice of disking a firebreak in violation of FWS regulations or obeying the regulations and risking losing their homes. Only later did FWS determine that the kangaroo rats had moved out of the area *before* the fires because excessive plant growth—induced by the ban on farming—had rendered the habitat unsuitable for them. DeLong, *It's My Land, Isn't It?*, N.Y. Times, Mar. 15, 1995, at A15.

- The FWS banned farmers in southwestern Idaho from pumping groundwater in 1985 in order to maintain existing groundwater levels and thus protect the survival of a listed springsnail—despite the fact that the springsnail was not known to populate any of the affected private property. See *Idaho Farm Bureau Fed'n* v. *Babbitt*, 839 F. Supp. 739 (D. Idaho 1993).

- Minnesota farmer Dale Polzin not only cannot hay his 80-acre prairie because it is covered with a prairie bush clover, a protected habitat, but that clover also prevents him from using pesticides on nearby corn and bean fields. Sands, *How Endangered Species Could Take a Bite Out of Your Farm*, Top Producer, Mid-Mar. 1992, at 28.

- In Tulare County, California, a farmer was fined $5000 and had part of his land confiscated for allegedly destroying the habitat of a listed blunt-nosed leopard lizard. Arax, *Immigrant Farmer's Woes*, L.A. Times, June 10, 1994, at A1.

As these examples demonstrate, FWS does not apply its regulation in the "circumscribed" manner it alleges (Pet. Br.

45), but rather to justify an aggressive land use management program never authorized by Congress. ESA's liberal citizen suit provisions (16 U.S.C. § 1540(g)) broaden the impact of the FWS's regulation still further, and well beyond the enforcement power of the FWS alone. Environmental groups and other private plaintiffs are even less likely than FWS to be circumspect in alleging illegal habitat modification.

The stories noted above are not about criminals, but about hard-working Americans seeking to work their land much as our forebears have done for centuries. It is simply not conceivable that Congress intended section 9 to target the otherwise lawful endeavors of these farmers. Nor is it at all surprising that Congress should have foregone the extra step of prohibiting habitat modification on private land. FWS's construction of "harm" creates perverse incentives that Congress would reasonably have wanted to avoid. Landowners who *create* habitat favorable to listed species will be *penalized* by losing control over that portion of their property; while those who *prevent* the growth of favorable habitat will be *rewarded* with full control. Thus, one small farmer in Washington allegedly cut down old-growth trees rather than risk attracting a listed spotted owl. Taylor, *Preserving Forests May Pay Off*, Seattle Post-Intelligencer, Oct. 13, 1993, at B1. A wealthier individual reportedly reacted in similar fashion: learning that golden-cheeked warblers were to be added to the endangered species list, a development corporation owned by Ross Perot allegedly razed 333 acres of juniper trees, the birds' preferred habitat, while the birds were off on a migrating sojourn to South America. Wright, *Death to Tweety*, New Republic, July 6, 1992, at 9-10.

In other words, not only does FWS's regulation unjustly sanction routine farming and ranching activities that may interfere with listed species' habitats, but in doing so it transforms something desirable—species-preserving habitats—into a spectre that any rational landowner must fear.

Ironically, then, it is likely to undermine the FWS's goal of preserving endangered species.

These few examples—we could multiply them many times over—provide but a glimpse into the havoc being wreaked by FWS's regulation. As new species are listed as endangered or threatened, its impact will widen and worsen.[5] Upholding the court of appeals would rein in this unfettered, terribly damaging, and wholly unjustified bureaucratic license to micro-manage the use of private land.

III. FWS'S CONSTRUCTION OF ESA SECTION 9 TO ENCOMPASS HABITAT MODIFICATION LEADS TO FIFTH AMENDMENT TAKINGS FOR WHICH JUST COMPENSATION MUST BE PAID

A ban on habitat modification indisputably interferes with individuals' rights to work or otherwise use their land. Because FWS's regulation prevents landowners from enjoying all the elements of the bundle of rights that is property ownership, it causes "takings" of property that, under the Fifth Amendment, must be compensated. See *United States* v. *General Motors Corp.*, 323 U.S. 373, 378 (1945) ("private property" encompasses the bundle of rights "to possess, use and dispose of" land). There is no sign, however, that Congress thought it was creating in the ESA an enormous, unfunded obligation of this sort for federal agencies (and ultimately for taxpayers). The absence of any mention in the legislative history of the ESA of constitutional protections for property rights or of the compensation requirement provides strong evidence that Congress never envisioned that a "take" of a listed animal could occur through habitat modification on private land.

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[5] In the first six months of 1994, FWS added 72 species to the list and proposed adding another 27. Mann & Plummer, *Noah's Choice*, *supra*, at 246.

A. FWS's Prohibition Of Habitat Modification Grossly Interferes With Historically-Protected Uses Of Private Property

Ownership of a farm without the right to farm the land is not the sort of property right our forebears had in mind when they ratified the Fifth Amendment. The Framers viewed property as a fundamental restraint on a government of limited powers, not as a limited privilege revocable by government. As John Adams put it, "[p]roperty must be secured or liberty cannot exist." *Discourses on Davila*, quoted in James Ely, Jr., *The Guardian of Every Other Right* 43 (1992).

The Framers included numerous protections for private property in the Constitution. Most notably, they gave it two entries in the Bill of Rights—the Due Process and Takings Clauses. But they also, for example, shielded landed wealth from federal taxation (Article I, § 9, cl. 4), twice singled out homes for protection (Amendments 3 and 4), and even limited forfeitures of property for the heinous crime of treason. Article III, § 3, cl. 3. In so doing, they recognized that property is an important guarantee of liberty. As James Madison put it, "just governments will equally respect the rights of property and the property in rights." Madison, *Property*, in 14 *The Papers of James Madison* 266 (Rutland & Mason, eds. 1983). See also Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 Cornell L. Rev. 87, 95 (1993).

In opinions written by contemporaries of the Framers, this Court recognized that "a right of land * * * includes the right to * * * receive the issues and profits arising from it." *Green* v. *Biddle*, 21 U.S. 1, 75 (1823). A law which "clogs [the owner's] recovery of such possession and profits, by conditions and restrictions tending to diminish the value and amount of the thing * * *, impairs his right to, and interest in, the property." *Id.* at 75-76. This dominion over one's

property was to be limited only by respect for the rights of others. *Sexton* v. *Wheaton*, 21 U.S. 229, 242 (1823) (property owner has "absolute power [to] make any disposition of it which does not interfere with the existing rights of others").

This Court has continued to recognize that protection of property rights is "a vital principle of republican institutions" (*Chicago, Burlington & Quincy R.R.* v. *Chicago*, 166 U.S. 226, 235 (1897)), that "rights in property are basic civil rights," and that "a fundamental interdependence exists between the personal right to liberty and the personal right in property." *Lynch* v. *Household Fin. Corp.*, 405 U.S. 538, 552 (1972); see also *Dennis* v. *Higgins*, 498 U.S. 439, 446 (1991) ("'dichotomy between personal liberties and property rights is a false one'").

Over the years, the Court has allowed government to restrain uses of property without paying just compensation in but two situations--where the restrained use amounts to a nuisance, and where the restraint promotes a "reciprocity of advantage" so that the burden on the owner as individual is eclipsed by the benefit derived as a member of the public. *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 491 (1987). Neither exception applies here. Clearing or otherwise working one's land has never been viewed as a nuisance. A private nuisance is an activity that "renders the occupancy of adjoining property dangerous, intolerable or even uncomfortable." *Camfield* v. *United States*, 167 U.S. 518, 523 (1897). A public nuisance has a similar effect on a wider circle of the community. FWS's enjoinder of habitat modification is not directed to an activity that could conceivably have any such effect. Nor is reciprocity of advantage implicated where there is such a gross disparity between the debilitating ban on using one's own property and any benefits derived from an incremental increase in the likelihood that a listed species inhabiting one's property will continue to exist.

Moreover, the FWS regulation unquestionably generates confusion among landowners as to what they may do with

their property. As one prominent environmentalist has conceded, "it is impossible for most landowners to translate [FWS's "harm" regulation] into clear and readily understandable rules regarding what they can or cannot do on their property." M. Bean *et al.*, *Reconciling Conflicts Under the Endangered Species Act: The Habitat Conservation Planning Experience* 43 (1991). A landowner often will lack the knowledge to determine if his activities are modifying the habitat of a listed species. Even if a landowner might suspect that his activity is degrading habitat, a non-biologist can surely not know whether existing animals will be killed or injured as a result. Still less can the landowner know whether "essential behavioral patterns, including breeding, feeding, or sheltering" would be "significantly impair[ed]" and so "kill or injure" future generations of wildlife in the eyes of FWS. 50 C.F.R. § 17.3. A regulation that requires a landowner to obtain a biology degree in order to appreciate the dangers of working his or her land—or face criminal prosecution—creates intolerable and wholly unfair uncertainty and defeats the security promised by ownership of private property.

Preventing landowners from working their land is a truly unprecedented intrusion by the federal government into the private domain. The record provides no hint that Congress intended such a startling upheaval in settled expectations. FWS cannot take upon itself to redefine the privileges and boundaries of property ownership. Upholding the court of appeals will sustain "the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." *Fuentes* v. *Shevin*, 407 U.S. 67, 81 (1972).

B. FWS's Construction Of Section 9 Causes Takings Of Private Property Requiring Just Compensation

FWS's edict making habitat modification one of the acts proscribed by section 9 "goes too far." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922). FWS's regulation,

by requiring private landowners to maintain potentially significant portions of their land in an undisturbed state, prevents the use and enjoyment of land and thus inevitably results in takings requiring compensation under the Fifth Amendment. It is inconceivable that Congress would not have noted and addressed this concern had it believed that the ESA could give rise to Fifth Amendment takings. It is also appropriate for this Court to scrutinize strictly a regulation which has so widespread and devastating an effect on property rights. See *Bell Atlantic Tel. Cos.* v. *FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994) (construing statute narrowly to defeat administrative order that would necessarily give rise to unconstitutional takings); see also *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 577 (1988) (narrowing agency's construction of statute that gives rise to "serious constitutional concerns").

This Court has recognized two types of categorical takings—where the government effects a physical occupation of real property and where it deprives the owner of all economic use of his land. Although at first blush 50 C.F.R. § 17.3 might appear to fit neither category, a closer look reveals otherwise.

1. Physical takings. A physical occupation takes place where "individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed." *Nollan* v. *California Coastal Comm'n*, 485 U.S. 825, 832 (1987). The occupiers need not be government officials or agents for the land to be deemed taken. See *ibid.*; *Kaiser Aetna* v. *United States*, 444 U.S. 164, 179-180 (1979). Nor need the occupation be particularly physically intrusive, or involve persons rather than objects. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

FWS's regulation allows selected animals to "pass to and fro" and in fact to set up a home base on private property free from the owner's interference. To a farmer prevented

from farming, there is no practical distinction between being hampered by sauntering tourists (identified as a taking in *Nollan* and *Kaiser Aetna*) or by aviating or nesting birds (as here). See *Kaiser Aetna*, 444 U.S. at 180 (imposition of servitude allowing access to third parties is "actual physical invasion" of property); Comment, *The Endangered Species Act and Ursine Usurpations: A Grizzly Tale of Two Takings*, 58 U. Chi. L. Rev. 1101, 1114 (1991) ("The ESA, by stifling preventive efforts, works a compensable taking through the physically intrusive and destructive actions of governmentally protected species"); *Christy* v. *Lujan*, 490 U.S. 1114, 1115-1116 (1989) (White, J., dissenting from denial of certiorari) (ESA authorizes the "constitutional equivalent" of a physical taking). FWS's "habitat modification" regulation at a minimum imposes negative easements on private lands, preventing farmers and other owners from meaningfully using parts of their property.[6]

2. Destruction of beneficial use. Whether or not it effects a physical occupation, the challenged regulation will destroy all beneficial use of some properties. A landowner forced "to leave his property idle" has suffered a categorical taking. *Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. 2886, 2895 (1992). Given that the home range for a single nesting pair of owls, for example, is 3-5 thousand acres (Flournoy, *Beyond the "Spotted Owl Problem": Learning from the Old-*

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[6] Moreover, a farm impeded from being farmed by the presence of listed species is not likely to be transferable. See Warren, *Rural Land Owners Say Pain Goes Beyond Data*, Wall. St. J. (Texas ed.), Dec. 21, 1994, at 1 ("property that's encumbered by endangered species might be impossible to sell at any price"); *Olson* v. *United States*, 292 U.S. 246, 256-258 (1934) (physical possibility of alternate uses for land does not preclude a taking where there is no demand for those alternate uses). The practical destruction of the right-to-transfer stick from the bundle of property rights should entitle the owner to just compensation. *Hodel* v. *Irving*, 481 U.S. 704, 716 n.2 (1987).

Growth Controversy, 17 Harv. Envtl. L. Rev. 261, 268 (1993)), the regulation may paralyze entire farms, ranches, and logging enterprises. See *Boise Cascade Corp.* v. *Board of Forestry*, 886 P.2d 1033 (Or. Ct. App. 1994) (state's refusal to permit logging operations due to presence of spotted owl nesting site may deprive land of all economic value); *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104, 127 (1978) (rendering property commercially impracticable may have same effect as complete destruction of property rights); *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349, 355 (1908) (Holmes, J.) (height restriction rendering property wholly useless is a compensable taking).

3. Significant diminution in value. Even if FWS's regulation would not render a property 100% worthless, a substantial loss of value is sufficient to qualify as a taking. A portion of a farm, for example a field or just the apple trees or citrus groves, may be deprived of all economic value, and such a "partial taking" should not be exempted from the requirements of the Fifth Amendment. See *Florida Rock Indus., Inc.* v. *United States*, 18 F.3d 1560 (Fed. Cir. 1994); *Loveladies Harbor, Inc.* v. *United States*, 28 F.3d 1171 (Fed. Cir. 1994). More generally, FWS's regulation effects so great an economic impact and such a defeat of investment-backed expectations as to constitute a taking.

In Austin, Texas, the lack of a clearance letter from FWS stating that no golden-cheeked warblers nor suitable habitat are present on one's property wrests 25 percent from the market value of the property. Mann & Plummer, *Noah's Choice*, *supra*, at 202. The harsh economic impact of not being able to farm sections of one's farm hardly needs elaboration. See *Penn Central Transp. Co.*, 438 U.S. at 127 (a "use restriction" may be a taking if it has "unduly harsh impact upon the owner's use of the property"). And certainly most farmers had no reason to expect, when they acquired their land, that the government would prevent them from the effective use of their farm because its trees attract certain

birds or its fields are home to certain rodents. See *Lucas*, 112 S. Ct. at 2894 n.7 (farmers' reasonable expectations have "a rich tradition of protection at common law").

4. Incidental take permits. The permitting scheme set forth in section 10(a), 16 U.S.C. § 1539(a), does not avert the confiscatory character of FWS's restrictions on "habitat modification." Of course, amici recognize that a permitting scheme does not in itself take property, because its very existence allows for the possibility of obtaining permission to freely use and enjoy one's land. *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985). But while FWS's regulation does not by itself constitute a Fifth Amendment taking, takings clearly *do* occur through the *operation* of the regulation. ESA's permitting process in no way means that Fifth Amendment takings will not occur. To the contrary, the nature of that process *guarantees* that temporary takings, at least, will be common. The complete absence of any indication that Congress conceived ESA would have these results is highly relevant to the issue of statutory interpretation in this case.

To obtain an incidental take permit, a landowner must submit a habitat conservation plan (HCP), including an environmental impact statement, a description of proposed mitigation techniques and funding for them, and an analysis of alternatives. There follows a public comment period. Thereafter, the Secretary must, before issuing a permit, develop detailed findings as to the nature of the "take," the mitigation efforts and their funding, the impact on listed species, and other concerns. Finally, even after the permit is issued, the property owner must meet extensive reporting requirements. 16 U.S.C. § 1539(a).

This permitting process is "arduous[,] * * * expensive and time-consuming"—taking up to three years. Dolan, *Endangered Species Act Battles for Its Own Survival*, L.A. Times, Dec. 21, 1992, at A1; *GAO Report* at 9. Farmers (and most other landowners) are often poorly equipped to

engage in the bureaucratic paperwork contemplated by section 10(a). Usually, they must hire both an attorney and biological consultants to assist in preparing the HCP. It is no surprise, then, that as of June 1994 FWS had issued only 31 HCP permits. *GAO Report* at 9. In the unlikely event that a property owner eventually obtains a permit, the affected property will have been tied up for a significant length of time, so a temporary taking will have occurred for which compensation must be paid. *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 318-319 (1987). The permitting process is no answer, then, to our showing that FWS's regulation has practical and Fifth Amendment implications that make it thoroughly implausible to suppose that when Congress enacted the ESA it had in mind to prohibit habitat modification on private land.

We do not dispute that preserving the habitat of some animals may be a cause worthy of public attention. But even if Congress had forbidden habitat modification by private individuals (which it plainly did not), private property may not be "pressed into some form of public service under the guise of mitigating serious public harm." *Lucas*, 112 S. Ct. at 2895. Congress was careful to respect this principle in the ESA; as the court of appeals noted, it imposed "very broad burdens" on the federal government and "relatively narrow ones" on individuals. 17 F.3d at 1466.[7] Thus, the floor manager of the House Bill explained that the Act provided for habitat preservation by individuals only via cooperation by "willing landowners." 119 Cong. Rec. 30162 (Sept. 18, 1973) (statement of Rep. Sullivan). The FWS has ignored that scheme and thereby paved the way for countless compensable takings.

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[7] Notably, the Act's requirements upheld by this Court in *Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153 (1978), were imposed on the federal government.

If farmers are to sacrifice their land for the good of the public interest in preserving listed species, the government has a constitutional duty to compensate them. See *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960) (the Framers "designed [the Just Compensation Clause] to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"). Congress must be presumed to be aware of this obligation, and if it had intended "take" to encompass habitat modification it would surely have explored the fiscal consequences and would have made its policy judgment clear. Its failure to do so shows what is in any event obvious from the language of the Act: neither "take" nor "harm" may legitimately be stretched to include "habitat modification" on private land.

CONCLUSION

The judgment of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted.

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MARCH 1995

No. 94-859

In the Supreme Court of the United States

OCTOBER TERM, 1994

BRUCE BABBITT, SECRETARY OF INTERIOR, ET AL., PETITIONERS

v.

SWEET HOME CHAPTER OF COMMUNITIES
FOR A GREAT OREGON, ET AL.

BRIEF OF *AMICUS CURIAE* ANDERSON & MIDDLETON LOGGING COMPANY, INC. IN SUPPORT OF AFFIRMANCE

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In the Supreme Court of the United States

OCTOBER TERM, 1994

NO. 94-859

BRUCE BABBITT, SECRETARY OF INTERIOR, ET AL., PETITIONERS

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SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, ET AL.

BRIEF OF *AMICUS CURIAE* ANDERSON & MIDDLETON LOGGING COMPANY, INC. IN SUPPORT OF AFFIRMANCE

INTEREST OF AMICUS CURIAE[1]

Amicus Anderson & Middleton Logging Company, Inc. ("A&M"), a small family owned logging company in Hoquiam, Washington, is the defendant in a pending civil action filed by the United States in December 1993, seeking to enforce the Endangered Species Act ("ESA") "harm" regulation, 50 C.F.R. § 17.3, that is the subject of this case.

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[1] The parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk pursuant to Rule 37.3 of the Rules of this Court.

United States v. Anderson & Middleton Logging Company, Inc., No. C93-5697R (W.D. Wash.).

In its case against A&M, the United States seeks to enjoin the company from logging a 71 acre timberland tract owned by A&M, based on what it alleges would be the resulting harm to a pair of northern spotted owls believed to be in the Olympic National Park some 1.6 miles from the tract. The government claims that timber harvesting on A&M's property will "harm" the spotted owl pair in violation of the ESA. This brief advises the Court of the government's position in the case against A&M, and discusses the impact of the harm regulation in the three-state region inhabited by the northern spotted owl.

SUMMARY OF ARGUMENT

The United States is asserting against A&M an expansive interpretation of the harm regulation, which contrasts sharply, and irreconcilably, with the narrower position the Secretary of Interior has presented to the Court in this case. The U.S. Fish and Wildlife Service ("FWS") has "formally endorsed" the sweeping interpretation asserted against A&M.

In its suit against A&M, which the Secretary approved and announced in Washington, D.C., the United States has interpreted the ESA harm regulation to dispense with important limitations the Secretary relies on in this Court to preserve the regulation's validity. The Secretary has applied the broader interpretation consistently to private landowners and federal agencies alike in the owl region since 1990.

In this Court, the government claims the harm regulation "applies only if the habitat modification or degradation is significant and actually kills or injures protected wildlife." Brief for Petitioners at 28. Yet in its case against A&M, the United States asserts that the harm regulation: (1) does **not** require any proof of actual killing or injury; (2) does **not** require any impact on a living animal; and (3) does **not** require that habitat modification be significant.

The action against A&M seeks to enforce northern spotted owl "incidental take guidelines" issued by the FWS in July 1990. The owl guidelines assert federal regulatory control over more than three million acres of private timberland in three states, and purport to demand that more than one million acres of private timberland be preserved in perpetuity to provide habitat for this single subspecies.

As the court of appeals below correctly perceived, the harm regulation expands federal regulatory power under the ESA far beyond the rest of the statute, and far beyond congressional intent. The ESA requires federal agencies to protect critical habitat, while private landowners have no similar duty. The harm regulation impermissibly reverses this congressional choice by giving federal wildlife agencies more power over private property than over federal land.

The broad interpretation of "harm" advanced against A&M is clearly contrary to congressional intent. Further, the conflict between the enforcement practice in the field and the narrower interpretation offered the Court in this case reduces or eliminates the deference the Court can give the Secretary's litigating position here.

The court below correctly invalidated the harm regulation.

STATEMENT OF FACTS

I. FACTS CONCERNING UNITED STATES V. ANDERSON & MIDDLETON LOGGING COMPANY, INC.

A. A&M's property.

A&M has owned a 71 acre tract within the Quinault Indian Reservation on the Olympic Peninsula in Washington state for more than 34 years. A&M purchased the land for its timber, the land is zoned for timber production, and the land has no economic use except as timberland.

B. The Northern Spotted Owl Incidental Take Guidelines.

The FWS listed the northern spotted owl as a threatened species under the ESA, 16 U.S.C. §§ 1531, *et seq.*, in 1990. *See* 55 Fed. Reg. 26114 (June 26, 1990).

In July 1990, the FWS released a document entitled "Procedures Leading To Endangered Species Act Compliance For the Northern Spotted Owl." Joint App. at 36. This document included "incidental take guidelines under sections 7 and 10" which purported to describe logging practices on private land (and federal land) that would be considered an illegal take of northern spotted owls under ESA § 9. Joint App. at 41-44. The logging practices which the FWS claimed would cause a take included logging which reduced "suitable spotted owl habitat" (certain forest stands more than 40-80 years old) to less than: (1) 70 acres surrounding a nest site; (2) 500 acres within a 0.7 mile radius of a nest site; or

(3) 40% of a larger circle around a nest site ranging from a 1.2 mile radius in California and southern Oregon to a 2.2 mile radius on the Olympic Peninsula in Washington. *Id.* These "take circles" are equal in size to the median "home range" of several small samples of owls studied in the 1980's.

The guidelines assume each pair of spotted owls occupies a "home range" in the shape of a circle equal in size to the median home range of a sample group of birds, and that each pair of owls needs 40% suitable habitat within the circle to survive and reproduce.

Between 1992 and 1993, the FWS discovered that its 2.2 mile radius take circle for the Olympic Peninsula reflected a computational error. Correcting this error led the FWS to increase the circle size on the Olympic Peninsula from a 2.2 to a 2.7 mile radius.

In 1991, the Sweet Home Chapter of Communities for a Great Oregon filed a lawsuit in Washington, D.C. (a companion to this case) challenging the owl guidelines on the ground they were a regulation adopted without notice and comment.[2] The FWS "rescinded" the owl guidelines in October, 1991 in response to this lawsuit.[3] The district court

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[2] *Sweet Home Chapter of Communities For a Great Oregon v. Turner*, Civil Action No. 91-2218 NHJ (D.D.C. August 30, 1991).

[3] Deposition of Marvin Plenart (August 3, 1994) at 79, 84. Mr. Plenart was from 1989 to 1994 the regional director of FWS for the region encompassing Washington and Oregon. *Id.* at 8-9. All deposition citations are to transcripts of depositions conducted in *United States v.*

(continued...)

court dismissed the case as moot, finding that the "FWS declared that the Guidelines were rescinded, thereby clearly indicating its intention no longer to apply or enforce them."[4]

Based on the rescission of the owl guidelines, the Washington Department of Natural Resources ("WDNR"), which regulates private forest management in the state, decided in 1992 to stop enforcing the large take circles against private landowners, and adopted a new rule requiring adherence to the 70 acre and 500 acre components of the rescinded guidelines.[5]

In January 1992 the FWS designated some six million acres of critical habitat for the northern spotted owl -- all on federal land.[6] The designation exempted all private land from critical habitat, including A&M's property.[7]

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[3] (...continued)
Anderson & Middleton Logging Company, Inc. The United States Attorney for the Western District of Washington has a copy of all cited transcripts and pleadings, which *amicus* can provide to the Court upon request.

[4] *Sweet Home Chapter of Communities For a Great Oregon v. Turner*, Civil Action No. 91-2218 NHJ, Memorandum Order (D.D.C. February 27, 1992) at 4, 5.

[5] *See* Washington Administrative Code 222-16-080(1)(h).

[6] 57 Fed. Reg. 1796 (January 15, 1992).

[7] *Id.* at 1807-08.

C. The case against A&M.

In 1991, A&M began making plans to harvest the trees on its 71 acre tract. It applied for a forest practices permit from the WDNR, and also sought a permit from the Quinault Nation.

WDNR issued a forest practices permit to A&M in 1992, determining that the 71 acre tract was not within 0.7 miles of a spotted owl nest site.[8] A&M also obtained the necessary forest practice permit from the Quinault Nation. Thus, A&M was fully authorized by state law and tribal authority to log the tract in 1992.

However, in December 1992, an FWS enforcement officer telephoned the president of A&M at his home. The FWS agent accused the company of violating the ESA, and informed him that A&M could be subject to criminal prosecution for illegally taking a pair of northern spotted owls known as the "Queets River Lower" pair, believed to be nesting some 1.6 miles from the tract. When it was clarified that A&M had not yet harvested the timber on its land, the FWS claimed that any exercise by A&M of its logging permit would be viewed as an illegal take of the owls. According to the FWS, logging by A&M would result in a take because there already was less than 40% suitable habitat within a 2.2 mile radius circle[9] of the owls' nest

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[8] Complaint, *United States v. Anderson & Middleton Logging Company, Inc.*, ¶ 16 (December 9, 1993).

[9] The FWS had not yet discovered its computational error which later caused it to increase the circle size for the Olympic Peninsula from a 2.2 to a 2.7 mile radius.

site.[10] A&M ultimately agreed to defer logging its tract to allow the FWS time to investigate the matter more thoroughly.

After the passage of nearly a year with no resolution of the FWS "investigation," A&M decided it could wait no longer to begin logging its tract. Because of the FWS' warnings and A&M's concerns about risking criminal sanctions, A&M sent written notification to the United States Attorney's office in Seattle in November of 1993 advising of its intent to begin timber harvesting.[11] On December 9, 1993, the United States Attorney, at the request of the FWS, filed a civil action against A&M to enjoin the planned logging, based on the harm regulation.[12] The complaint sought a temporary restraining order and preliminary and permanent injunctions against logging the tract. The United States alleged logging by A&M would result in the following "actual injury":

> The result of the removal of this timber will be to force the Queets River Lower pair to range farther to find replacement suitable habitat in which to forage. With this forced modification of their behavior comes the

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[10] Declaration of E. Charles Meslow at ¶¶ 8-20 (December 30, 1993).

[11] Complaint, *United States v. Anderson & Middleton Logging Company, Inc.*, ¶ 19 (December 9, 1993).

[12] While the complaint also initially claimed the logging would unlawfully "harass" the owls, the United States later abandoned the "harass" theory and has proceeded solely on the "harm" claim.

> attendant side effects including impairment of reproductivity and, in a worse case scenario, death by starvation or exposure to predators.[13]

The complaint does not allege, and the United States admits that it has no evidence, that the Queets River Lower owl pair has ever been on the A&M tract.[14]

D. The case against A&M is based on the Northern Spotted Owl Incidental Take Guidelines.

The complaint against A&M relies entirely on the take circle concept in the "rescinded" owl guidelines. Based on its revised 2.7 mile take circle for the Olympic Peninsula, the FWS claims that logging which would leave less than 5,708 acres of suitable owl habitat (40% of the take circle) within 2.7 miles of the Queets River Lower pair of owls is a take. Since, according to the FWS, there already is less than 5,708 acres of suitable habitat remaining within that circle, it claims that logging the 71 acre A&M tract will harm the owls and therefore illegally take them under 16 U.S.C. § 1538 and 50 C.F.R. § 17.31 (applying "take" prohibitions to threatened species).

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[13] Complaint, *United States v. Anderson & Middleton Logging Company, Inc.*, ¶ 21 (December 9, 1993). A preliminary injunction has been entered deferring logging until trial. The trial has been postponed due to congressional interest in transferring the property to federal ownership.

[14] United States' Responses to Defendant's Preliminary Interrogatories, Interrogatory No. 1 (January 11, 1994).

The FWS based its internal investigation of A&M entirely on the "rescinded" owl guidelines. The FWS biologist who worked up the A&M case testified that the official who rescinded the guidelines instructed him in 1991 to continue to use the guidelines internally to assess illegal take by private citizens and federal agencies, and that the only change after their "rescission" was that the guidelines were no longer handed out to the public.[15]

FWS no longer denies that is continuing to enforce the take circles in the "rescinded" guidelines. In February 1995, the FWS proposed an amendment to its regulations under § 4(d) of the ESA, 16 U.S.C. § 1533(d), to eliminate the spotted owl take circles in some areas in Washington and California. 60 Fed. Reg. 9484 (February 17, 1995). The notice explained the rule was "in response to the President's directive to review the blanket set of incidental take prohibitions for the northern spotted owl that has been in effect since the listing." *Id.* at 9489. Those prohibitions are the incidental take guidelines.

E. The case against A&M was filed with the knowledge and approval of the Secretary of Interior.

The day after the complaint against A&M was filed, the Secretary of Interior issued a press release in Washington, D.C. announcing the filing of the case.[16]

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[15] Deposition of James Michaels (June 16, 1994) at 27-28. Mr. Michaels has served since 1985 as the FWS' endangered species coordinator for the state of Washington. *Id.* at 8-9.

[16] Department of the Interior, Office of the Secretary, News Release at 3 (December 10, 1993).

F. Absence of direct proof for the United States' case against A&M.

The FWS action against A&M is not based on any actual information about the pair of owls that A&M's logging supposedly will "harm." No federal official visited the property before the suit was filed. There is no evidence the owls have ever been on A&M's property. At the time the United States filed the suit, the owls in question had not been seen for over 18 months. The United States subsequently admitted it could not establish that the owls still exist.[17]

The case is based entirely on the biological concepts in the owl guidelines. The United States admits that the biological methodology in the owl guidelines "is not described in any published, peer-reviewed scientific journal, [and] has never been subject to scientific peer review."[18]

1. The United States admits it has no knowledge about the actual size and shape of the Queets' River Lower pair's home range.[19] The contention on which it premised the lawsuit -- that the A&M tract is within the home range of the owl pair -- is based entirely on a string of assumptions built on the data of 10 other owl pairs studied on the Olympic Peninsula between 1987 and 1989.[20] The government also

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[17] Deposition of E. Charles Meslow (July 5, 1994 and August 9, 1994) at 126, 217. Dr. Meslow was designated as the United States' expert in the case against A&M. *See infra* at 14 and n.31.

[18] Response to Request For Admission No. 9 (August 6, 1994).

[19] Response to Request For Admission No. 4 (August 6, 1994).

[20] *Id.*

admits, however, that the 10 owl pairs studied are not a random sample of owls on the Olympic Peninsula, and that it cannot verify if these 10 locations are an accurate representation of owl home ranges.[21]

2. The government admits there is no scientific basis for using median home range size to define the area in which an illegal take of a northern spotted owl could occur. There has been no statistical analysis of the validity of this concept.[22] The median was used as a "management prescription,"[23] and proves nothing about the actual size of a home range for a particular pair of owls.[24]

3. The United States admits it is "highly unlikely" that the actual home range of any pair of spotted owls is a circle, and also admits that the shape of a home range is likely to be influenced in part by the unique geographic distribution of suitable habitat that is available.[25]

4. The United States admits the 40% suitable habitat requirement is "primarily based" on a single paper by two

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[21] Deposition of Dr. Eric Forsman at 18-22. Dr. Forsman, a spotted owl biologist employed by the Pacific Northwest Research Station of the U.S. Forest Service, collected the data on the 10 owl pairs. *Id.* at 9.

[22] Meslow Deposition at 171-72.

[23] *Id.* at 175.

[24] *Id.* at 175.

[25] Response To Request For Admission No. 6 (August 6, 1994).

biologists published in 1992.[26] However, both authors have stated that the paper does not support the 40% suitable habitat requirement.[27]

The United States has no evidence that owls on the Olympic Peninsula need 5,708 acres of suitable habitat to survive and reproduce.[28] It concedes that a significant proportion of owls are capable of reproducing in areas with less than 40% suitable habitat, and that this has occurred in hundreds of cases.[29]

G. Threat of extinction is not an element of the harm regulation in the case against A&M.

The case against A&M under the harm regulation does not involve any threat of the extinction of the northern spotted owl subspecies. The United States admits that "logging the Anderson & Middleton property will not cause the extinction of the northern spotted owl subspecies."[30]

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[26] Response to Request For Admission No. 7 (August 6, 1994).

[27] Forsman Deposition at 75-78; *see* Michaels Deposition at 115-20.

[28] Forsman Deposition at 79.

[29] Meslow Deposition at 226-28.

[30] Response to Request For Admission No. 1 (August 6, 1994).

H. The United States' methodology in this case, which has been "formally endorsed" by the FWS, eliminates proof of actual injury or death and other important limitations in the definition of harm.

The United States designated Dr. E. Charles Meslow, a biologist with the National Biological Survey (formerly with the FWS), as its expert at trial.[31] Dr. Meslow testified to the interpretation of the harm regulation that he applied in determining that A&M's proposed logging is illegal. His interpretation: (1) eliminates the requirement that the challenged conduct "actually kills or injures wildlife"; (2) views reduced reproduction rates for an animal population as harm even where there is no impact on any living animal; (3) treats any lessening in a behavioral pattern as an impairment; and (4) eliminates the requirement that any impairment in an animal's behavioral patterns is "significant."

1. The United States interprets the harm regulation to eliminate any need to prove that the challenged conduct "actually kills or injures wildlife."

Dr. Meslow testified as follows:

> Q. Do you have an understanding of the term "actually kills or injures wildlife" under the definition in the Endangered Species Act?
>
> ...

---

[31] Designation of E. Charles Meslow as Expert Witness for the Government (July 18, 1994).

A. The pertinent part for this is that it may include significant habitat modification that leads to alteration of behavior.

...

Q. Does there have to be actual killing or injury?

A. No.

...

Q. So modifying the behavior is actual killing or injury; is that what you are saying?

A. Yes.

...

Q. ... If you identify an act which significantly impairs essential behavioral patterns, is it your understanding that you have thereby identified an act that harms wildlife within the meaning of the definition?

A. Yes.[32]

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[32] Meslow Deposition at 75-76, 109-110, 113 (objection of counsel omitted).

2. *The United States interprets the harm regulation to eliminate the need to prove any impact on living animals where habitat modification reduces the reproduction rate of an animal population.*

Dr. Meslow interprets the essential behavioral pattern of "breeding" in the harm regulation to "include not just the behavior of breeding, but the result of that breeding."[33] The regulation treats lack of breeding success as an impairment of an essential behavioral pattern, although it does not actually kill or injure any living animal:

> Q. How does breeding success or reproduction actually kill or injure wildlife?
>
> A. It would be the lack of breeding success that would kill or injure the population.
>
> ...
>
> Q. Does lack of breeding kill or injure the Queets River Lower owls?
>
> A. No. Their continued existence as individual owls is relatively independent of their success in breeding, but without having successful breeding, they make no contribution and they are only space -- they're only taking up space and actually could be precluding the presence of a pair that might be able to successfully breed.
>
> ...

---

[33] *Id.* at 80.

Q. [Interfering with reproduction] would not affect existing owls, correct?

A. I agree with you.[34]

3. The United States interprets the harm regulation to relax proof of impairment.

Dr. Meslow defines the term "impairing" in the harm regulation to mean "[d]iminishing, interfering with, lessening, in a negative sense."[35] Thus, any lessening of a behavioral pattern is an impairment under the regulation.

4. The United States interprets the harm regulation to eliminate proof of significance.

Dr. Meslow interprets the word "significantly" in the second sentence of the harm regulation (in the phrase "significantly impairing essential behavioral patterns") to mean "biologically significant" rather than "statistically significant."[36] He can think of no impairment of an essential behavior pattern that is not "significant,"[37] and he believes that "by the time a biologist would recognize that impairment has taken place, I think it would be a significant impairment."[38]

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[34] *Id.* at 84-85, 87.

[35] *Id.* at 108-09.

[36] *Id.* at 94-95.

[37] *Id.* at 95.

[38] *Id.* at 95-96.

5. The FWS has formally endorsed the methodology for determining "take" that is being used against A&M.

The government admits that "[t]he scientific methodology used by the United States to determine take in this case has been formally endorsed by the United States Fish and Wildlife Service."[39]

II. FACTS CONCERNING THE REGIONAL IMPACT OF THE HARM REGULATION THROUGH THE NORTHERN SPOTTED OWL INCIDENTAL TAKE GUIDELINES.

A. The owl guidelines subject millions of acres of private land to federal regulation.

The result of the harm regulation, as applied through the spotted owl incidental take guidelines, is to grant the FWS (and the federal courts, in citizen suits) power to regulate more than three million acres of private timberland in the three-state region by restricting, or prohibiting, the only economically feasible use of these lands -- producing timber.

Of 5,431 known northern spotted owl site centers in the United States, over 1,300 site centers are located on non-federal land.[40] More than 800 site centers are on private land.

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[39] Response to Request For Admission No. 9 (August 6, 1994). This admission was made after Dr. Meslow described his approach to take at his deposition.

[40] 60 Fed. Reg. at 9495 (February 17, 1995).

In Washington, at least 86 known spotted owl sites are on private land.[41] Under the owl guidelines, the take circles for these sites are 6,600-14,271 acres in size. Within each circle, 40% of the acreage (2,640-5,708 acres) must be maintained as spotted owl habitat to avoid a take. Joint App. at 44; *supra* at 4-5. This brings over 500,000 acres of private land in Washington under federal control through the harm regulation.

In Oregon, 128 spotted owl nest sites exist on private land,[42] each encompassing a take circle of 2,500-3,400 acres in size in which 1,000-1,360 acres of habitat must be preserved. This gives the FWS regulatory control over some 375,000 acres of private land in Oregon.

In California, over 630 spotted owl nest sites are located on private land in the heavily timbered northern part of the state.[43] The owl guidelines require a take circle of 2,500 acres in a 1.2 mile circle around each of these sites, in which 1,000 acres of habitat must be preserved, bringing some 1,575,000 acres of private land in California under federal regulatory control.

Thus, the harm regulation presently subjects almost 2.5 million acres of private land in Washington, Oregon, and

---

[41] Final Environmental Impact Statement on Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl ("FSEIS") (U.S. Departments of Agriculture and Interior) (February 1994) at D-5.

[42] *Id* at D-7.

[43] *Id.* at D-8.

California to FWS supervision and control. One million acres of this private timberland must, under the owl guidelines, be preserved at all times to avoid any "harm" to northern spotted owls.

These figures do not fully define the harm regulation's reach onto private land. Throughout much of the spotted owl region, private land and federal land are closely intertwined. Drawing a 1.2-2.7 mile circle around many spotted owl sites on **federal land** brings hundreds of thousands of additional acres of private land under federal control. The FWS recently reported that 1,165 spotted owl sites on federal land "are dependent upon some percentage of suitable habitat on adjacent non-Federal lands to support the owls."[44]

The government's case against A&M illustrates this situation. The United States sued A&M to preserve privately-owned habitat for the Queets River Lower owl pair although the owls were believed to be located on federal land in the Olympic National Park. Upwards of one million acres of similarly intermingled private and federal timberlands are also subject to FWS regulation through the harm regulation.

In total, the harm regulation as applied through the spotted owl incidental take guidelines gives the FWS regulatory power over more than three million acres of private timberland in the three-state region.

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[44] 60 Fed. Reg. at 9495 (February 17, 1995).

B. The owl guidelines also subject other non-federal lands to federal regulation.

The harm regulation also subjects other non-federal lands, owned by the states, counties and municipalities, to federal regulation through the owl guidelines. There are at least 39 spotted owl sites on such lands in Washington, 27 sites in Oregon and nine sites in California,[45] bringing over 350,000 acres of state, county and municipal land under FWS regulation. Large amounts of tribal lands are also subject to the guidelines.

ARGUMENT

THE COURT BELOW CORRECTLY HELD THAT THE HARM REGULATION IS NOT AUTHORIZED BY THE ESA

Under "Step One" of the *Chevron* analysis, the Court "must reject administrative constructions which are contrary to clear congressional intent." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). Under "Step Two" of the *Chevron* analysis, even if Congress' intent is not clear, the court must reject an agency construction that is not "a reasonable interpretation." *Id.* at 844.

Under either step of the *Chevron* analysis, the Court should reject the harm regulation. It is contrary to unambiguous congressional intent, and it is unreasonable when measured against Congress' goals in the ESA.

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[45] FSEIS, *supra* n.41, at D-4-D-8.

A. The harm regulation has brought millions of acres of private land under federal regulation, contrary to the intent of Congress.

The majority below correctly understood that the Secretary's interpretation of "harm" in § 9 vastly expands the reach of the ESA to bring millions of acres of private land under federal regulation and control. Pet. App. 91a. While the Secretary's brief attempts to minimize the actual impact of the harm regulation on private land, Brief for Petitioners at 47-49, the real effect of the harm regulation, as shown by the spotted owl guidelines, is precisely as the court below understood it.

The owl guidelines brought over three million acres of private land in Washington, Oregon and California under immediate federal regulatory control. *See supra* at 18-20. Millions more acres are subject to federal control if a spotted owl relocates or is discovered on or near the land. The federal control is total: the FWS may prohibit the only viable use of the land -- timber production -- or may condition it (in the unlikely event a land owner goes through the expensive, time consuming, and rarely successful effort to obtain a § 10 incidental take permit), on any restrictions, limitations or harvesting procedures the agency may choose. 16 U.S.C. § 1539.

The government itself acknowledges the current reach of the harm regulation in the owl region in its recent regulatory proposal under § 4(d) of the ESA. 60 Fed. Reg. 9484. The FWS estimates that at least 6.5 million acres of non-federal forest **in the state of Washington alone** are currently or potentially subject to federal regulation under "present

incidental take prohibitions for owls." *Id.* at 9499.[46] The proposal would lift the larger take circles on 5.24 million acres in Washington, leaving them in place on 1.3 million acres. *Id.* The proposal would also leave the take circles in effect everywhere in Oregon and in parts of California. *Id.* at 9485, 9504.

Without the harm regulation, the FWS claims no statutory authority to regulate these millions of acres of private land to protect a single subspecies. The only other term in the statute that the FWS has ever cited to support restrictions on habitat modification is "harass." *See* Joint App. at 42. Yet the FWS has never interpreted "harass" to include habitat modification, as it does "harm". *Compare* 50 C.F.R. § 17.3 definition of "harass" with definition of "harm". In adopting the "harm" and "harass" definitions in 1975, the FWS stated that the prohibition on environmental degradation was removed from the definition of "harass" and moved to the definition of harm. Joint App. at 50-51.[47]

Thus, the Secretary is forced to argue that when Congress added the term "harm" to the definition of "take" in § 9 of

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[46] The notice expressly acknowledges concern over the present applicability of "the requirement that 40 percent suitable habitat be left within a home range circle," 60 Fed. Reg. at 9489, and repeatedly recognizes by implication the application of the owl guidelines. *See, e.g., id.* at 9502 ("the Service generally would retain existing incidental take protection for owls located within [certain areas]."); *id.* at 9485 ("current incidental take restrictions would be retained").

[47] Congress' only expressed intent regarding the interpretation of "harass" was in relation to birdwatching, far removed from habitat modification. H. R. Rep. No. 412, 93rd Cong., 1st Sess. at 11 (1973).

the ESA in a package of "technical and clarifying amendments," 119 Cong. Rec. 25,682 (July 24, 1973), it intended to greatly expand the ESA's reach beyond what it was before the word was added.[48]

Yet not one member of Congress, including the sponsor of the "technical and clarifying" Senate amendment adding "harm" to the bill, nor any committee report, ever suggested that the term "harm" vastly broadened the "take" definition to encompass federal regulation of millions of acres of private land that otherwise was beyond federal control. Nothing in the words or legislative history of "harm" shows any congressional intent for this single word to support federal regulation of millions of acres of private property.

B. The harm regulation reverses a clear congressional choice in the ESA by subjecting private landowners to stricter and more inflexible regulation than federal land management agencies.

The court of appeals below correctly found that the harm regulation displaces a congressional judgment in the ESA to

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[48] Prior to adding "harm" in the definition, the Senate Committee had explained that it understood "take" to be defined "in the broadest possible manner," S. Rep. No. 307, 93rd Cong., 1st Sess. at 14 (1973). This legislative history strongly implies Congress did not believe habitat modification could even possibly be encompassed by the prohibition on "take." At the time the committee wrote the report, habitat modification was **not** prohibited within the term "take." Congress could not have believed the term was defined in the "broadest possible manner" at that point if Congress had thought it was "possible" that habitat modification **could** be prohibited as a take. Congress must have believed that it could not prohibit habitat modification within the term "take." Nothing suggests adding the word "harm" changed this belief.

impose greater habitat protection duties on federal land than on private land. Pet. App. 92a-93a. The Secretary disputes that conclusion in his brief. Petitioner's Brief at 41-44. Again, the court below was correct.

Congress addressed habitat protection in the ESA through designation of "critical habitat" in 16 U.S.C. § 1533(a)(3).[49] In a clear legislative choice, Congress gave private landowners no legal duty to protect critical habitat for a listed species, while requiring federal agencies to insure their actions are not likely to result in the destruction or adverse modification of designated critical habitat. 16 U.S.C. § 1536(a)(2). Yet enforcement of the harm regulation achieves the contrary result by placing **substantially greater** regulatory restrictions on private land than the ESA places on federal land.

The FWS has determined that it will approve destruction or modification of critical habitat as long as jeopardy to a protected species is not likely to result.[50] If a federal action passes the jeopardy test, the FWS **must** grant the agency an incidental take authorization under § 7(b)(4). Unlike a private citizen seeking a permit under § 10, the federal agency need not submit and assure funding for a conservation plan, need not propose mitigation, need not minimize the

---

[49] Congress also authorized federal agencies to purchase desired habitat from private landowners, 16 U.S.C. § 1534, a power that was largely unnecessary if private landowners were already compelled to allow the federal agencies to control the use of their land.

[50] *See* 50 C.F.R. § 402.02 (definitions of "destruction or adverse modification" and "jeopardize the continued existence of").

impacts of the taking and need not provide any other assurances to the FWS. *Cf.* 16 U.S.C. § 1539(a)(2).[51]

Thus, while a federal agency is free to destroy critical habitat as long as jeopardy to a species is avoided, the harm regulation prohibits private citizens from modifying millions of acres of non-critical habitat on private land without going through the costly, time consuming and highly uncertain incidental take permit process.

These contrasting procedures have revealed themselves tellingly in the case against A&M. Just four months before the United States sued A&M under the harm regulation to protect the Queets River Lower pair of owls, the FWS reviewed a Bureau of Indian Affairs ("BIA") proposal to conduct a 75 acre clearcut logging operation about one mile away from the A&M property -- within the same take circle for the same pair of owls. Finding that the BIA logging would not jeopardize the northern spotted owl subspecies, FWS granted the BIA incidental take authorization, with no restrictions of any kind, to "take" the Queets River Lower pair of owls.[52] Although the United States admits logging the A&M tract also will not jeopardize the northern spotted owl, it is suing A&M under the harm regulation to stop

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[51] The difficulty of a private citizen obtaining an incidental take permit under ESA § 10, as compared to a federal agency obtaining authorization under § 7, is further discussed in Carter, *A Dual Track for Incidental Takings: Reexamining Sections 7 and 10 of the Endangered Species Act*, 19 Envtl. Aff. 135, 161-63 (1991); and Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. Colo. L. Rev. 277, 351-58 (1993).

[52] Michaels Deposition at 176-81.

logging virtually identical to the federal logging it previously approved -- to protect a pair of owls it already authorized the BIA to take.

This disparity between treatment of private citizens and federal agencies is not an isolated case. Between 1990 and 1994, the FWS authorized federal agencies to take some 1,500 pairs of northern spotted owls by logging within take circles on federal land.[53] In contrast, since 1990 the FWS has issued only one incidental take permit to a private company for logging in spotted owl habitat.

Thus, the harm regulation subjects the owners of more than three million acres of private "non-critical" owl habitat to more rigorous FWS control than the federal land management agencies receive on the six million acres of federal "critical" habitat. Imposing this greater burden on private landowners reverses Congress' clear decision to require federal agencies, but not private citizens, to protect habitat for listed species. 16 U.S.C. § 1536(a)(2).

C. The Secretary's broad interpretation of the harm regulation applied against A&M is further proof the Secretary's interpretation of "harm" in the ESA is contrary to Congress' intent.

The primary argument offered by the Secretary in this Court to save the harm regulation is a narrow interpretation that emphasizes three purported limitations in its language: "under the Secretary's interpretation, [the harm regulation] applies only if the habitat modification or degradation is [1]

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[53] Plenart Deposition at 146-47.

significant and [2] **actually kills or injures** [3] **protected wildlife**." Brief for Petitioners at 28 (emphasis and numbering added); *see id.* at 16, 20, 21, 29, 30-31, 41, 45.

Yet in its administrative practice, the FWS applies none of these limitations in enforcing the harm regulation:

1. No proof is required that the challenged conduct "actually kills or injures." The impairment of an essential behavioral pattern is enough, without more, to violate the regulation. *Supra* at 14-15.

2. No proof of impact on an existing animal is required. A reduction in an animal population's reproductive rate violates the harm regulation even though no existing animal is affected. *Supra* at 16-17.

3. "Significance" has disappeared entirely: any observable lessening of an essential behavioral pattern violates the rule. *Supra* at 17.

The FWS has employed this broad interpretation of the harm regulation consistently since publishing the northern spotted owl guidelines in 1990, Joint App. at 42-44, and continues to do so at the present time even while it asserts contrary views in this Court.

The broad interpretation given the regulation in practice confirms how far from congressional intent the FWS has moved. Regulating private land management that, in many cases, has no effect on any protected animal is "contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n.9.

D. The Court should not defer to the Secretary's interpretation of "harm" presented in this Court since it contradicts the interpretation the Secretary currently applies in enforcement of the regulation.

Even if the Court reaches step two of the *Chevron* analysis, the Court should not give deference to the interpretation of the statute offered by the Secretary in this Court because that interpretation so fundamentally contradicts the position the FWS has "formally endorsed" in its case against A&M, and has used in ESA enforcement for years.

This Court will not blindly defer to an agency's revised interpretation of a statute or regulation that is tailored to win a case in this Court:

> ... [T]he consistency of an agency's position is a factor in assessing the weight that position is due. As we have stated, "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view."

Good Samaritan Hospital v. Shalala, -- U.S. --, 113 S. Ct. 2151, 124 L. Ed. 2d 368, 382-83 (1993) (citations omitted).

The Court may decline to give any deference to an agency litigating position that contradicts the agency's administrative practice. *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988). "Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." *Id.* at 213; *accord, Bankamerica Corp. v. United States*, 462 U.S.

122, 130-32 (1983); *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 858 n.25 (1975). Here the Court should decline to give any weight to the Secretary's interpretation of the term "harm" in light of his current inconsistent and contradictory construction of the term in the spotted owl guidelines and in the enforcement action against A&M.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Dated this 24th day of March, 1995.

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No. 94-859

In The

Supreme Court of the United States

October Term, 1994

BRUCE BABBITT, SECRETARY OF THE INTERIOR, et al.,

Petitioners,

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF THE STATE WATER CONTRACTORS, ASSOCIATION OF CALIFORNIA WATER AGENCIES AND CENTRAL VALLEY PROJECT WATER ASSOCIATION AS AMICUS CURIAE, URGING AFFIRMANCE

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INTEREST OF AMICI

The State of California is highly dependent upon the projects which convey water to its urban areas and its farms. Roughly 75% of California's water resources are found north of the City of Sacramento, while approximately 75% of the urban and agricultural water demand within California occurs south of the City of Sacramento. To deal with this geographical imbalance of supply and demand, both the State and the Federal governments

have constructed interdependent water projects whose purposes include the transfer of water from where it is found to where it is consumptively used. Together, these projects provide water to more than two-thirds of California's urban population and the vast majority of its farmland.

Amicus, State Water Contractors ("Contractors") is a non-profit incorporated association comprised of 27 public agencies formed under the laws of the State of California. Each of the agencies holds a contract with the State of California to receive water from California's State Water Resources Development System or "State Water Project." By means of these contracts, the State Water Project provides some 20 million urban residents and nearly a million acres of farmland in California with all, or a portion, of their water supply.

Amicus, Central Valley Project Water Association ("CVPWA") is a non-profit, incorporated association comprised of 80 public agencies formed under the laws of the State of California. Each of the agencies holds a contract with the United States to receive water from the federal Central Valley Project. By means of these contracts the Central Valley Project provides some 4 million households and 3 million acres of farmland with all, or a portion, of their water supply.

Amicus, Association of California Water Agencies ("ACWA") is a non-profit incorporated association consisting of some 419 public agencies who are urban and agricultural water purveyors and flood control agencies formed under State law. Many of the members of ACWA receive their water supply directly, or indirectly, from the

State Water Project or from the federally constructed Central Valley Project. The water deliveries provided by ACWA's members account for over 90% of the water consumed by urban and agricultural water users in the State of California.

The State Water Project ("SWP") and federal Central Valley Project ("CVP") both function, in significant part, by storing water and spring runoff in reservoirs located along the Sacramento River or its tributaries, upstream of the Sacramento-San Joaquin Delta ("Delta"). When the stored water is needed to meet the consumptive demands of urban or agricultural users or the water quality or flow requirements of instream species, it is released from these reservoirs to flow downstream to the Delta – a roughly triangular maze of meandering channels and agricultural islands located approximately 90 miles east of the Golden Gate Bridge.

When it enters the Delta from the north, the previously stored water is capable of flowing in two directions. If it flows to the southerly reaches of the Delta, it can be lifted by SWP and CVP pumps into canals which serve urban users in the San Francisco Bay area and urban and agricultural users in the San Joaquin Valley and Southern California. If it is not pumped by the two projects or consumptively used by farmers in the Delta itself, the released water will flow westerly toward the Golden Gate Bridge; thence to the Pacific Ocean.

In a practical sense, the Delta thus forms the hub of California's water supply system, with water flowing in from upstream impoundments to be distributed from the Delta to both consumptive users and instream species.

Historically, the balance between distribution for consumptive use by SWP and CVP users, on the one hand, and allocation to instream needs, on the other, was determined by the provisions of water rights permits issued by the State of California. (*See, e.g. California v. United States*, 438 U.S. 645 (1978) and California Water Code Sections 1243, 1243.5 and 1257.5) More recently, however, the operations of the SWP and CVP, and thus the balance between consumptive and instream water use in the Delta, have been dictated by the United States Fish and Wildlife Service ("USFWS") and National Marine Fisheries Service ("NMFS").

This fundamental shift in regulatory authority results from the fact that the Delta, in addition to serving as the hub of California's principal water projects, also provides habitat for two aquatic species listed under the Endangered Species Act ("ESA"). (16 U.S.C. §§ 1531 *et seq.*) The winter run chinook salmon, an anadromous species listed as endangered, uses the Delta as part of its migration corridor to and from the Pacific Ocean. The delta smelt, listed as a threatened species, is largely resident within the Delta year round.

Based upon their conclusions regarding the habitat requirements of the winter-run salmon and delta smelt, and the effects of the operations of the SWP, the USFWS and NMFS have designated critical habitat (59 Fed. Reg. 65256) pursuant to Section 4 of the ESA (16 U.S.C. § 1533) and issued biological opinions pursuant to Section 7 of the ESA (16 U.S.C. § 1536) which radically alter the operational standards and procedures of the CVP and SWP to the detriment of those, such as *amici*, who are reliant upon project water supplies. (*See e.g. Westlands*

Water Dist. v. U.S. Dept. of Interior (E.D. Cal. 1994) 850 F.Supp. 1388, 1421). Importantly, the federal fishery agencies have made these changes without any substantial consideration of the economic impacts of doing so. Using the artificial definition of "harm" found in their regulations,[1] but not in the ESA itself, both the USFWS and NMFS have managed to avoid any substantial evaluation of the economic impact of their Delta-related ESA activities upon California's urban and agricultural water users – even in those instances where Congress has expressly directed that such an evaluation take place.

In Section 4 of the ESA, Congress specifically directed the Secretary of the Interior and the Secretary of Commerce to designate "critical habitat" for threatened and endangered species only *after* making an evaluation of the economic impact of doing so:

> "The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available *and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat.* The Secretary may exclude any area from critical habitat *if he determines that the*

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[1] The regulations adopted by the USFWS and NMFS provide, in relevant part:

> "*Harm* in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." (50 CFR § 17.3)

> *benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat. . . . "* (16 U.S.C. § 1533(b)(2); emphasis added)

By equating "harm" with "habitat modification" for the purpose of determining whether a prohibited "take" has occurred within the meaning of Section 9 of the ESA,[2] the USFWS and NMFS have managed to avoid any substantial compliance with the foregoing statutory obligation. Thus, for example, in the course of recently designating the entire Sacramento-San Joaquin Delta as "critical habitat" for the delta smelt, the USFWS stated the following under the heading "Consideration of Economic and Other Factors":

> "Section 9 of the Act and Service regulations prohibit the taking of delta smelt without express authorization from the Service. *Under Service regulations, 'take' may include significant habitat modification or degradation that actually kills or injures protected species.* In addition, Federal agencies must consult with the Service to ensure that their actions are not likely to jeopardize the continued existence of the listed species. An action could jeopardize the existence of a listed species if it destroys or modifies its habitat. This is so regardless of whether the

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[2] Section 9 of the Endangered Species Act (16 U.S.C. § 1538) provides in relevant part:

> " . . . with respect to any endangered species of fish or wildlife listed pursuant to Section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to:
>
> (C) take any such species within the United States or the territorial sea of the United States."

> habitat has been designated as critical habitat. *Therefore, the direct economic and other impacts resulting from designation of critical habitat are relatively small because the Act provides substantial protection to habitat through listing of the species itself."* (65 Fed. Reg. 65262, emphasis added)[3]

Thus, although Congress added an economic analysis obligation to the ESA with the expectation that the full cost of the actions of the USFWS and NMFS would be considered,[4] the agencies have managed to defeat Congress' purpose by means of the administrative regulation at issue in this case. Rather than analyze the "economic impact" of their actions as Congress intended, the agencies, instead, engage in segmented, minimalist analyses which assign the bulk of the economic impact of their ESA activities to the listing process.[5] This is accomplished

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[3] In 1992, NMFS used the identical rationale to avoid any meaningful analysis of the economic impact of designating critical habitat for the winter-run salmon. (57 Fed. Reg. 36626, 36630)

[4] In 1982, when Congress reauthorized and amended the ESA (P.L. 97-304) the House Report which accompanied the amendments stated the following:

> "Desirous to restrict the Secretary's decision on species listing to biology alone, the [Merchant Marine and Fisheries] Committee nonetheless recognized that *the critical habitat designation, with its attendant economic analysis, offers some counter-point to the listing of species without due consideration for the effects on land use and other development interests."* (ESA Amendments of 1982, H.R. 567, *reprinted* in 1982 U.S. Code Cong. & Admin. News 2807, 2812 (Merchant Marine and Fisheries Committee).)

[5] The agencies have not limited their avoidance of the economic analysis obligation imposed by Congress to aquatic

by means of the regulation which equates "harm" with "habitat modification," making such modification independently controllable through the "take" provisions of the ESA simply as a result of listing a species. The act of designating critical habitat – including its associated requirement of disclosing the economic cost of ESA regulation – is thus marginalized.

The results of this bureaucratic maneuvering are predictable. While the actions of NMFS and the USFWS have resulted in the loss of hundreds of thousands of acre-feet of water to the two-thirds of California's urban and agricultural economy dependent upon SWP and CVP exports from the Delta (*see e.g.* 59 Fed. Reg. 65263) an evaluation of the *economic impact* of such loss has never occurred. Instead, after allocating the bulk of the economic impact to the *listing* of the delta smelt (based upon its own regulation) the USFWS has concluded that the economic impact of its critical habitat designation is limited to "sand and gravel operations" and agricultural activities within the Delta itself. (59 Fed. Reg. 65262) As a consequence, the *substantial* economic impact visited upon the Californians, such as *amici* and the more than 25 million Californians they serve, who are dependent upon CVP

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species which utilize the Delta. Instead, they have apparently developed a pattern and practice of utilizing the definition of "harm" concocted in 50 C.F.R. 17.3 to avoid any meaningful analysis of the economic impact of designating critical habitat of *any* species, including terrestrial species. (*See, e.g.*, 57 Fed. Reg. 34892, 34896, segmenting the analysis of economic impact of designating critical habitat for the least Bell's vireo.)

and SWP Delta exports in their homes, their businesses and on their farms, has been completely ignored.

SUMMARY OF ARGUMENT

In the course of developing a regulatory regime for the protection of threatened and endangered species, Congress dealt explicitly with the protection of habitat. It required the designation of critical habitat for listed species and established a well-defined mechanism for such designation which incorporates the requirement of an analysis of the economic impact of species protection.

The administrative definition of the word "harm," adopted by the Secretary to include "habitat modification," renders meaningless the critical habitat designation process established by Congress. Pursuant to the definition, *all* of the habitat utilized by a species is automatically protected immediately upon listing, thus making the designation of critical habitat pointless. The same administrative definition is also being used by the USFWS and NMFS to avoid Congress' directive to balance the economic impact of species protection as part of the process of critical habitat designation. Because the agencies have defined "harm" to include "habitat modification," they uniformly find that the major economic impact of species protection occurs at the time of listing. They thus piecemeal the economic impact analysis required by Congress and, by loading the bulk of the impact upon the listing determination (which includes no economic impact requirement), uniformly conclude that

the economic impact of designating critical habitat is negligible.

The legislative history of the Endangered Species Act fails to support this administrative misinterpretation and avoidance. When Congress amended the ESA in 1978, it considered proposed legislation which would have defined the "take" of species to include the modification of their habitat. It elected, instead, to exclude habitat modification from the definition of "take," notwithstanding testimony from several sources that habitat modification should be included.

Instead, Congress chose to deal with habitat protection in other ways. In Section 4 of the Act, it required the Secretary to designate critical habitat. In Section 7, it directed the Secretary to protect such designated habitat by proposing "reasonable and prudent alternatives" to federal activities which threaten to adversely modify such habitat. In Section 5 of the Act, Congress empowered the Secretary to purchase habitat by exercising powers granted under the Fish and Wildlife Coordination Act and other federal legislation, for that purpose. Finally, Congress directed the Secretary to develop recovery plans for listed species which are required to incorporate elements described with such breadth that they may encompass a variety of habitat restoration and protective measures.

What Congress did *not* do – and what the Secretary, consequently, may not do himself by regulation – is define "harm," for purposes of determining the "take" of listed species, to include the modification of their habitat. Because the Secretary has thus attempted to do what

Congress elected not to do; indeed, because he is attempting to use his own administrative definition to defeat the economic balancing obligation imposed by Congress, the Secretary's action is *ultra vires* the authority granted by the Endangered Species Act. It should therefore be rejected as arbitrary and capricious within the meaning of the Administrative Procedure Act.

ARGUMENT

I. INTERPRETING "HARM" TO INCLUDE "HABITAT MODIFICATION" RENDERS THE DESIGNATION OF CRITICAL HABITAT MEANINGLESS

Section 4 of the Endangered Species Act (16 U.S.C. § 1533) requires the Secretary of Interior, in conjunction with the listing of a species, to designate critical habitat:

> "(A) [The Secretary] shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat;. . . . "[6]

By defining harm to include habitat modification, the Secretary renders meaningless the above-quoted requirement of critical habitat designation. If the prohibition

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[6] As explained, *infra*, Section 7 of the ESA (16 U.S.C. § 1536) obligates the Secretary to review the actions of other federal agencies to ensure that they do not result, *inter alia*, in the destruction or modification of critical habitat. (16 U.S.C. § 1536(a)(2)) The Secretary's designation of critical habitat is, thus, an important habitat protection mechanism under the terms of the ESA.

against "harm" also prohibits modification of the habitat of any listed species, there is no reason for the Secretary to designate critical habitat. Instead, *all* of the habitat of *every* listed species would already be protected. It is evident from the provisions of Section 4 of the ESA, however, that this was not Congress' intention.

In Section 4 of the Act, Congress made the consideration of economic impacts an integral part of the designation of critical habitat for every listed species. It provided:

> "The Secretary shall designate critical habitat . . . after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." (16 U.S.C. § 1533(b)(2))[7]

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[7] The legislative history of the economic analysis provision is instructive on this issue. As originally enacted, Section 4 of the ESA (16 U.S.C. § 1533) did not require consideration of the economic impacts associated with the designation of critical habitat. Congress changed that in 1978 by adding a new paragraph to Section 4(b) which incorporated essentially the same economic analysis language which appears in the current version of the ESA.

The amendment which added the economic analysis requirement arose out of H.R. 14104 of the 95th Congress. The bill was introduced on September 18, 1978 by Representative Leggett of California. According to its accompanying House Report, H.R. 14104 represented a compromise between disparate points of view: the bill attempted to retain the basic integrity of the ESA while introducing some flexibility which would permit exemptions from the Act's requirements. (H.R. 95-1625, *reprinted in* 1978 U.S. Code Cong. Admin. News 9453, 9463-4)

Based upon this consideration of economic impacts, Congress then directed the Secretary to conduct a weighing and balancing process from which the final designation of critical habitat would emerge:

> "The Secretary may exclude any particular area as critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned." (16 U.S.C. § 1533(b)(2))[8]

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[8] On October 14, 1978, during the debates in the House leading to adoption of the bill, Representative Leggett, the author of H.R. 14104, which added the economic balancing requirement to Section 4 of the ESA, described the purpose of the requirement:

> "The Endangered Species Act has been criticized because it allows for no consideration of the economic impact of listing a species or designating critical habitat. Although H.R. 14104 retains the Act's stringent mandate, it does introduce a consideration of economic impact in several respects. First, the consideration of economics is central to the exemption process. . . . Second, the Bill includes a provision which requires the Secretary to evaluate the economic impact of designating critical habitat for invertebrate species. This provision authorizes the Secretary to alter the designation of critical habitat for the species if he determines that the benefits associated with excluding the habitat outweighs the benefits associated with the designation. . . . " (Remarks of Representative Leggett, 124 Cong.Rec. 38134 (1978))

Considering the nature of the weighing and balancing process directed by Congress, the manner in which the Secretary conducts his required economic analysis takes on obvious significance. The greater the anticipated economic impact, the more likely it is that critical habitat will be reduced, and vice versa.

If habitat is *already* protected simply through the listing of a species, however, then there is little or no significance to the economic balancing obligation which Congress described in detail in Section 4. Instead, the entirety of the habitat utilized by a listed species would *already* be protected – regardless of the resulting economic impact – simply by Congress' choice of the word "harm," in Section 3(19) of the Act (16 U.S.C. § 1532(19)) to define the meaning of "take."

The results of this skewed administrative interpretation of the word "harm" are amply demonstrated by the rule finally adopted by the USFWS to designate habitat for the delta smelt in California. (59 Fed. Reg. 65256) Rather than evaluating the actual economic impact of protecting the habitat of the delta smelt, the rule segments the economic analysis and considers only the *incremental* impact resulting from the critical habitat designation. It thus provides:

> " . . . [t]he impacts of designating critical habitat are in addition to the economic and other impacts attributable to (1) listing of the species, (2) economic effects resulting from conservation actions taken by other Federal agencies under section 7(a)(1) of the Act, and (3) regulatory actions required by other laws." (59 Fed. Reg. at 65262)

By erecting this artificial construct, nowhere described in the ESA, the rule thus reaches the remarkable conclusion that designation of the entire Sacramento-San Joaquin Delta as critical habitat, including the pumping plants of the CVP and SWP used to supply water to two-thirds of California's entire urban and agricultural population, will result in only a minimal economic impact. (*Id.*) So concluding, USFWS excludes no area, whatsoever, from its earlier proposed critical habitat designation. (59 Fed. Reg. at 65264)

The USFWS's use of the device of an *incremental* economic impact analysis – possible only if "harm" is defined to include "habitat modification" – thus effectively eliminates the restraints imposed through the economic balancing process created by Congress in Section 4 of the ESA. As illustrated by the example of the delta smelt, the resulting "analysis" conducted by the Secretary is nothing more than a charade.

II. THE LEGISLATIVE HISTORY OF THE ESA DEMONSTRATES THAT "HARM" DOES NOT INCLUDE "HABITAT MODIFICATION"

Congress defined the word "take" as used in Section 9 of the Endangered Species Act to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct." (ESA § 3(19), 16 U.S.C. § 1532(19) (1988))

This definition is significantly different from the proposed definition found in S. 1983, the original ESA bill referred to the Senate Committee on Commerce, which

defined the "take" of wildlife to include " . . . the destruction, modification, or curtailment of its habitat or range." (S. 1983, 93d Cong., 1st Sess., § 3(6)(A) (1973); *see A Legislative History of the Endangered Species Act of 1973, As Amended, of 1976, 1977, 1978, 1979 and 1980,* prepared by the Congressional Research Service for the Senate Committee on Environment and Public Works 1982 (hereinafter "Legislative History"), p. 228)

The above-quoted reference to habitat modification originally appearing in S. 1983 was subsequently deleted in favor of a definition of "take" which *excludes* any reference to habitat. (Legislative History, p. 343) While the legislative history does not indicate why Congress chose the existing definition of "take," the rejection of the "habitat modification" language appearing in an earlier version of the bill ultimately adopted by the Senate should not be interpreted as an oversight.

In the course of interpreting Congress' purpose in drafting the Endangered Species Act, this Court has attributed considerable significance to other deletions of language from earlier versions of S. 1983. In *TVA v. Hill,* 437 U.S. 153 (1978), for example, the Court elaborated its discussion of the expansive scope of Section 7 of the ESA with the following reference to deletions made to S. 1983:

> "What is very significant in this sequence is that the final version of the 1973 Act carefully omitted all of the reservations described above. In the bill which the Senate initially approved (S. 1983), however, the version of the current [Section] 7 merely required federal agencies to 'carry out such programs *as are practicable* for the protection of species listed. . . . ' S. 1983, § 7(a).

> (Emphasis in original) By way of contrast, the bill that originally passed the House, H.R. 37, contained a provision which was essentially a mirror image of the subsequently passed § 7 – indeed all phrases which might have qualified an agency's responsibilities had been omitted from the bill." (*Id.* at 182, emphasis in original, footnote deleted)

In describing the foregoing legislative changes, the Court acknowledged that the legislative history contained no "specific reference to [the] choice of provisions," but relied upon congressional statements to determine its meaning. (*Id.* at 183) Here, a similar examination of the record leads unmistakably to the conclusion that Congress knowingly excluded "habitat modification" from the definition of "take" when it adopted the definition of the term which now appears in the Act.

At the same time that S. 1983 was working its way through the Senate, the Senate Subcommittee on the Environment was considering S. 1592, another endangered species bill which defined "take" *without* including language relating to habitat modification. (S. 1592, 93rd Cong., 1st Sess. (1973)) Several witnesses testifying in hearings conducted by the Subcommittee on S. 1592 criticized the bill for precisely that reason. For example, Dr. John W. Grandy, Administrative Assistant for the Wildlife, National Parks and Conservation Association, testified that:

> "The definition of 'take,' in the case of animals, should include 'threatened destruction, modification, or curtailment of habitat.' In my opinion, adequate habitat is the key to survival of

> most endangered species. Coupled with that should be the ability for the Secretary to prohibit 'taking.' " (*The Endangered Species Act of 1973: Hearings Before the Senate Subcommittee on the Environment on S. 1592 and S. 1983*, 93rd Cong., 1st Sess. 108 (1973))

Similarly, Mr. John S. Gottschalk, Executive Vice-President of the International Association of Game, Fish, and Conservation Commissioners, testified:

> "[The] legislation should incorporate the well-established fact that while legal protection and law enforcement are needed, maintenance of critical habitat is vital to the restoration of endangered species. Because taking native species is not the reason for their decline the prohibition on taking contained in section 4 can be expected to be of little utility. . . . Accordingly, federal legislation should come to grips more forcefully with the critical issue of habitat. To this end we urge a more specific directive designed to stem the disappearance of critical habitat." (*Id.*)

The debate in the Senate also discussed habitat loss as an important cause of the decline of various species. The result, however, was a proposal for land acquisition, not a proposal to include habitat modification within the meaning of "take." Senator Tunney, the floor manager of the Endangered Species Act legislation in the Senate in 1973, for example, expressed his recognition of the need to protect habitat. In doing so, however, he also recognized that such protection was provided through the "acquisition" of habitat, not the prohibition of "take":

> "Many species have been inadvertently exterminated by a negligent destruction of their habitat.

> Their habitats have been cut in size, polluted, or otherwise altered so that they are unsuitable environments for natural populations of fish and wildlife. Under this bill, we can take steps to make amends for our negligent encroachment. The Secretary would be empowered to use land acquisition authority granted to him in certain existing legislation to acquire land for the use of the endangered species programs. . . . *Through these land acquisition provisions, we will be able to conserve habitats necessary to protect fish and wildlife from further destruction.*" (Legislative History, p. 358, emphasis added)

Thus, even the proponents of the Endangered Species Act viewed land acquisition as the primary means to avoid habitat loss on private lands, never suggesting that such loss could be prevented through the "take" provisions of Section 9 of the Act. Indeed, the statement of Senator Gaylord Nelson, a strong proponent of protecting threatened and endangered species, underscores the point that habitat modification was not to be included in the definition of "take," but rather would be dealt with through acquisition:

> "Because of this act, an animal or fish species will not be overtly 'taken, . . . ' [¶] Yet, it is common knowledge that there is another danger to our wildlife, a threat which is unavoidable: the expansion of our cities and industries. . . . *This act acknowledges that habitat modification is liable to be increasingly prevalent as the cause of future wildlife losses. The Secretaries of Interior and Commerce are authorized to acquire the lands upon which the endangered and threatened species reside and funds are provided for this purpose.* Habitat acquisition will provide a framework, a base for

> the construction of true sanctuaries, preserves free from harmful human intrusions." (Legislative History, p. 403, emphasis added)

The legislative history in the House of Representatives is consistent with the above statements. The Report of the Committee on Merchant Marine and Fisheries, for example, stated:

> "Man can threaten the existence of species of plants and animals in any of a number of ways, by excessive use, by unrestricted trade, by pollution or by other destruction of their habitat or range. The most significant of those has proven also to be the most difficult to control: the destruction of critical habitat."
>
> "Clearly it is beyond our capability to acquire all the habitat which is important to those species of plants and animals which are endangered today, without at the same time dismantling our civilization. On the other hand, there are certain areas which are critical which can and should be set aside." (Legislative History, p. 144)

Nowhere does the legislative history support the argument that a species' habitat could be protected merely through the listing process. Instead, the consistent emphasis in Congress was on habitat designation or acquisition as the means of protection.

III. OTHER PROVISIONS OF THE ENDANGERED SPECIES ACT PROVIDE AMPLE AUTHORITY TO PROTECT HABITAT, THUS RENDERING THE SECRETARY'S DEFINITION OF "HARM" UNNECESSARY

The Endangered Species Act includes several procedures which give the Secretary of the Interior ample authority to protect the habitat of listed species. This authority makes it unnecessary for the Secretary to venture beyond the language of the ESA by defining "harm" to include "habitat modification."

As noted by those who spoke to the issue during debate on the Act, a primary method of habitat protection authorized by the ESA is the straightforward *purchase* of habitat utilized by listed species. Thus, Section 5(a) of the Act (16 U.S.C. § 1534(a)) requires the Secretary of the Interior to establish and implement a program to conserve endangered and threatened species. To enable the Secretary to do so, Congress granted the Secretary broad authority to:

> "(1) . . . utilize the land acquisition and other authority under the Fish and Wildlife Act of 1956, . . . the Fish and Wildlife Coordination Act, . . . and the Migratory Bird Conservation Act [citation omitted], as appropriate; and
>
> "(2) . . . acquire by purchase, donation, or otherwise, lands, waters, or interests therein, and such authority shall be in addition to any other land acquisition authority vested in him." (16 U.S.C. § 1534(a)(1) and (2))

The ESA also grants the Secretary the power to protect habitat by reviewing the actions of other federal

agencies to ensure that those actions do not result, *inter alia*, in the destruction or adverse modification of critical habitat. To this end, Section 7(a)(2) of the Act (16 U.S.C. § 1536(a)(2)), provides:

> "Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species *or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, ...* " (Emphasis added)

In the event consultation between the action agency and the Secretary demonstrates that adverse modification of habitat *will* result from a project as proposed, Congress required the Secretary to suggest "reasonable and prudent alternatives" to the project which, in the Secretary's belief, would not generate adverse habitat modification or destruction. (16 U.S.C. § 1536(b)(3)(A))[9]

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[9] As is the case with the designation of critical habitat, the development of "reasonable and prudent alternatives" includes a significant element of economic balancing. Thus, Senator Howard Baker, an author of the amendments which added the "reasonable and prudent alternatives" language to the ESA in 1978, noted the view of the Senate Environment and Public Works Committee that the "reasonable and prudent" concept required not only an examination of engineering "feasibility," but also an examination of "community impacts, economic feasibility, and other relevant factors." (Legislative History, p. 1148)

Finally, Section 4 of the Act (16 U.S.C. § 1533(f)) requires the development and implementation of recovery plans for the conservation and survival of threatened and endangered species. In the course of detailing the contents of such plans, Congress wrote in terms sufficiently broad to encompass a variety of actions that would deal with habitat modification. Thus, Congress required the Secretary, "to the maximum extent feasible," to incorporate the following in recovery plans developed under the Act:

> "a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species; . . . . " (16 U.S.C. § 1533(f)(1)(B))

In sum, the provisions of Sections 4, 5 and 7 of the Endangered Species Act grant the Secretary broad authority to protect habitat. Such protection can be provided by the purchase of property, the development of reasonable and prudent alternatives to a proposed project which would otherwise adversely modify habitat, and the development of recovery plans which contain "site-specific management actions." Taken together these provisions provide ample authority to protect the habitat of any listed species, without resort to the *ultra vires* definition of "harm" employed by the USFWS.

By attempting to prohibit habitat modification by means of an over-inclusive administrative definition of "harm," rather than through the development of "reasonable and prudent alternatives," the USFWS, again, is attempting to avoid the balancing of economic impacts, which Congress intended it to undertake.

CONCLUSION

For all of the foregoing reasons, the judgment of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

DATED: March 23, 1995

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No. 94-859

In The

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Petitioners,

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INTEREST OF THE AMICI CURIAE

Amici curiae are four Indian Tribes who are unable to secure the economic benefits of their valuable senior federal reserved water rights in the San Juan River Basin of New Mexico and Colorado because of restrictions imposed by the United States Fish & Wildlife Service (FWS) under the authority of § 7 of the Endangered

Species Act (ESA), 16 U.S.C. § 1536.[1] Because title to the four Tribes' water rights are held by the United States as trustee, any effort to economically develop these water rights triggers the complex § 7 procedures imposed on federal agencies.

The Tribes have occupied the lands adjacent to the San Juan River system from time immemorial. They embrace the goals of the ESA – to conserve endangered and threatened species. Yet, their experience with current FWS practices in the San Juan River shows that, contrary to Congress' plan, the conservation plans put in place to implement the ESA have failed to "take into consideration" the impact of federal policies on the cultural and social welfare of the Tribes.[2]

The Tribes are afraid that Congress' plan to carefully evaluate limitations imposed on private lands and waters when § 7 is invoked has been replaced with an end around criminal prohibition inserted by FWS regulation in § 9. The Tribes urge the Court to consider the failure of the FWS to protect the Tribes as private owners of habitat when assessing the reasonableness of the inclusion of

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[1] The parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk pursuant to Rule 37.3 of the Rules of this Court.

[2] ESA policies in the San Juan have not only adversely affected the Tribes' cultures and way of life, but also the conservation plans have effectively repealed efforts by Congress to assist the four Tribes to economically develop their senior water rights. *See,* Jicarilla Apache Tribe Water Right Settlement Act, Public Law 102-441; Colorado Ute Water Rights Settlement Agreement, Public Law 100-585; Navajo Indian Irrigation Project, Public Law 87-483.

"habitat modification" in the definition of harm in the case at hand.

SUMMARY OF ARGUMENT

The Tribes file this brief amici to bring to the attention of the Court the dangers to Tribal societies when the ESA is administered, as it has been in the San Juan Basin, not in conformity with Congress' specific statutory habitat protections. Reservation lands and waters have been exposed to what the Tribes believe is an unreasonable implementation of the ESA by the FWS. Specifically, the Secretary has targeted Reservation habitat without providing the Tribes with the protections inserted by Congress in § 7 while at the same time exposing Tribal members under § 9 to the risk of serious federal punishment.

The Tribes' concern the ESA implementation not impair their way of life is also directly implicated by 50 C.F.R. § 17.3 – the regulation at issue in this litigation. The Tribes as governments are responsible for protection of their Reservation lands and waters. If portions of their Reservations have habitat which is essential to the protection of threatened or endangered species, the Tribes and their members are subject to potential criminal prosecution when managing their Reservation lands and waters as they have since time immemorial. The Tribes seek protection from the Court through a decision confirming that criminal penalties should not be imposed on Tribal members who inadvertently kill or injure endangered or

threatened species while engaging in traditional Reservation land and water management activities.

ARGUMENT

A. FWS' Treatment of the Definition of "Harm" is Not Reasonable – On One Hand FWS Ignores Congress' Habitat Plan Under § 7 and On the Other Hand It Rewrites Congress' Habitat Concepts Under § 9.

The amici curiae four Indian Tribes of the San Juan Basin urge the Court to find that FWS' inclusion of "habitat modification" in the definition of "harm" inserted into § 9 of the ESA is unreasonable.

FWS has fundamentally rewritten Congress' plan to have the listing of threatened or endangered species based solely on biological information, while at the same time assuring that the impact of such listing on the resources of private citizens is thoughtfully examined. In the San Juan Basin, conservation biology dictates not only the listing process but also drives the restrictions imposed on private lands and waters as a result of species listing. While the former is in line with Congress' plan, the latter is not.

FWS has accomplished this restructuring of the ESA by: 1) selectively adding regulatory enforcement features not included by Congress in the ESA; and 2) ignoring Congress' mandate to protect private habitat of greatest value to its owners. We next describe how FWS has accomplished this rewriting of the ESA.

Step One: Under 16 U.S.C. § 1533 the Secretary is to first determine whether any species is endangered or threatened. In making that determination, the Secretary is permitted to examine a variety of natural or man-made factors including inadequacy of existing regulatory mechanisms, disease, over utilization for commercial recreation, scientific or educational purposes, or a threatened destruction, modification or curtailment of habitat.[3]

Step Two: 16 U.S.C. § 1533(a)(3) provides that concurrently with making the determination described above, the Secretary shall designate any habitat of such species which is then considered to be critical. Critical habitat is defined in 16 U.S.C. § 1532(5) as habitat essential to the conservation of the species and which may require special management considerations or protections. In determining critical habitat, the Secretary is instructed to use not only the best scientific data available, but also shall "take into consideration" the economic impact and any other relevant impact of specifying any particular area as critical habitat. 16 U.S.C. § 1533(a)(3). Moreover, the Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat . . . " *Id.*

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[3] The brief amici curiae of the *National Wildlife Federation, et al.*, erroneously informs the Court, p. 3, fn. 2, that when listing the Secretary "must consider" potential impacts on habitat. To the contrary, 16 U.S.C. § 1533, expressly provides the Secretary with a variety of non-habitat factors which he may rely upon to support a listing.

Step Three: Once a species has been listed as endangered or threatened and once habitat has been designated as critical, then limitations are imposed under § 9 (the takings provision) and under § 7 (the consultation provision). Under § 7, each federal agency shall ensure that its actions are not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat which is determined to be critical. 16 U.S.C. § 1536(a).

Congress did not define what it means to jeopardize the continued existence of any endangered species or define what is destruction or adverse modification of critical habitat. As a result, the Secretary in 50 C.F.R. § 402.02 defined "jeopardizing the continued existence" to mean:

> To engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

The Secretary also defined "destruction or adverse modification" to mean:

> A direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.

Id.

Under § 9, 16 U.S.C. § 1538, additional protections for endangered species are established through the imposition of criminal penalties. Congress made it unlawful for any person to "take any such listed species within the United States." Congress at 16 U.S.C. § 1532(19) defined "take" to mean:

> To harass, harm, pursue, hunt, shoot, wound, kill, trap, or capture or collect, or to attempt to engage in any such conduct.

Whereas under § 7 the Secretary elected by executive regulation to define "jeopardize the continuing existence of" and "destruction or adverse modification" because Congress had failed to do so, under § 9 the Secretary added a new concept – this time not to fill a missing term but rather to impose an executive gloss on what is a complete congressional definition of "take." The Secretary's regulatory gloss – at issue in this litigation – states:

> Harm in the definition of "take" in the act means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3.

The Secretary, acting through FWS, has implemented this habitat scheme in a way which takes away Congress' protections for private habitat under § 7 while at the same time exposing the owners of private habitat to serious federal punishment under § 9. First, FWS has failed to designate a critical habitat "concurrently" with listing as is required by Congress, 16 U.S.C. § 1533(a)(3).

See, Jim Saltzman, "Evolution and Application of Critical Habitat Under the Endangered Species Act," 14 Harvard Environmental Law Review, 311 (1990).

Second, FWS has failed to adhere to Congress' careful plan to protect private lands and waters when developing federal policies to protect endangered or threatened species. Specifically, Congress required in two places that FWS mitigate the impact of its listing on private lands and waters. Under 16 U.S.C. § 1533(b)(2), when designating habitat which is critical to the conservation of a species, the Secretary is to "take into consideration" the economic impact and any other relevant impact.[4] To take into consideration is defined to take into account, to exercise a "thoughtful and sympathetic" regard for the impacts on private parties. See definition of "consideration" in *Webster's New Collegiate Dictionary* (G. & C. Merriam Company, 150 Anniversary Edition 1981). Moreover, when taking steps to assure that federal agencies do not take actions which are likely to jeopardize the continued existence of any endangered species or the destruction or the adverse modification of critical habitat, the Secretary is again required to utilize "consultation" – this time with the affected states – so that state and private interests are again evaluated when conservation measures are fixed. 16 U.S.C. § 1536(a). Consultation includes deliberation and deliberation is defined as "resulting

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[4] Congress intended ESA implementation to balance biologically defined conservation measures with real life impacts. That is, in the administration of the ESA, FWS is to consider the "economics and any other relevant impacts" and "factors of recognized or potential importance to human activities." H. R. Rep. No. 1625, 95th Cong., 2d Sess. (1978), p. 17.

from careful and thorough consideration." See definition of "deliberation" in *Webster's New Collegiate Dictionary* (G. & C. Merriam Company, 150 Anniversary Edition 1981).

When habitat essential to species preservation is designated concurrently with listing and involves thoughtful and sympathetic consultation, both FWS and private citizens can implement Congress' § 7 plan to protect special habitat. Such consultation can also alert citizens to their non-habitat duty under § 9 – namely to avoid direct injury to a listed species. The Tribes have found little interest on the part of FWS to either minimize the impacts of § 7 actions on Reservation lands and waters or to narrow Tribal member exposure to § 9 criminal liability.

B. In the San Juan Basin FWS Has Adversely Affected the Tribes' Reservation Lands and Waters and Has Improperly Exposed the Tribes and their Members to Criminal Penalty.

FWS asks this Court to uphold its regulatory definition of harm as "reasonable in light of the legislature's revealed design," *Nations Bank v. Variable Annuity Life Ins. Co.*, No. 93-1612 (Jan. 18, 1995), slip op. 5. In rendering its decision, it is important for the Court to understand in real life terms the scope of Congress' plan and what has been FWS' implementation. When viewed in that light, the inclusion of "habitat modification" in the definition of "harm" is not reasonable.

A prime example of how FWS treats habitat issues can be seen from the Tribes' experience in the San Juan Basin. Sixteen years ago, in 1979, FWS advised three of the four Tribes that development of their senior water

rights would not threaten or endanger the Colorado squawfish or razorback sucker. *See*, December 28, 1979 § 7 consultation on the Animas LaPlata water storage project. Twelve years later, in 1991, FWS issued revised consultations which concluded, contrary to its 1979 opinion, that, in fact, the effort of the Tribes to develop their water resources would likely jeopardize two endangered or threatened fish species. *See*, October 25, 1991 consultation on the Animas LaPlata and October 28, 1991 biological opinion on the Navajo Indian Irrigation Project.[5]

In the twelve years between 1979 and 1981, FWS made no effort whatever to sit down with the Tribes and designate critical habitat on the Tribes' Reservations in a way which would minimize harm to the Tribes and their

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[5] The FWS revisited consultation – reversing its twelve year record of no jeopardy – occurred literally days before the Animas LaPlata Project – originally authorized in Congress in 1968 – was to begin construction. FWS' endangered species timing in the San Juan Basin is reminiscent of Senator Garn's observations in 1978 that in its actions under § 7, FWS appeared less interested in protecting an endangered specie – the one at issue in 1978 was the furbished louse wart – than on a desire to stop a water project, in 1978 the water project was the Dickey Lincoln Project. *See* Hearings on S. 2899 before the Subcommittee on Resource Protection, the Senate Committee on Environmental and Public Works, 95th Cong., 2nd Sess. (1978), p. 45. Also, the Court should understand that one of the listed species – the Colorado squawfish is a predator which a generation ago federal and state wildlife officials attempted through poisoning to eradicate from the San Juan Rivers and the second of the listed species – the razorback sucker has only had one of its specie seen in the San Juan system in the last 29 years and that sighting occurred in Utah miles away from the Colorado/New Mexico Reservation lands occupied by the Tribes.

members.[6] To the contrary, the Secretary failed to consistently follow his own regulatory scheme and made ad hoc findings of "jeopardy." Thus, with respect to proposed water development in Colorado, the Secretary concluded that the actions of the Tribes would "appreciably reduce the likelihood of both the survival and recovery of the species in the wild by further reducing its numbers, reproduction, and distribution." October 25, 1991 FWS Opinion. At the same time, when limiting Indian depletions in New Mexico, FWS made no reference to a pending reduction in species numbers, reproduction, and distribution, but rather concluded that the Indians economic development efforts would increase "concentrations of contaminants in its habitat." October 28, 1991 FWS Opinion.

These FWS' findings of jeopardy show FWS arbitrarily mixing species designation with habitat considerations. Obviously, they provide the Tribes with very little guidance as to what Reservation lands and waters the federal government considered to be critical. Indeed, in

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[6] Consulting with the Tribes to minimize ESA impacts is not only required by Congress in the designation of critical habitat provisions of 16 U.S.C. § 1536, but also it is essential to preserving the longstanding trust relationship between the United States and the Tribes. FWS as a federal agency is "duty-bound to exercise great care in administering" its trust. *United States v. Mason*, 412 U.S. 391, 398 (1972). Moreover, when the exercise of this trust duty occurs simultaneously with FWS' habitat selection duties under ESA, it "must choose the alternative that is in the best interest of the tribes." *See Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1567 (10th Cir. 1984) (Seymour, J., concurring in part and dissenting in part), *modified*, 782 F.2d 855 (1984) (en banc) (adopting dissenting opinions).

its 1991 opinions FWS gave no attention whatsoever to critical habitat or to the prospects of the Tribes and their members becoming subject to criminal penalty under§ 9.[7] Rather, FWS utilized its 1991 jeopardy opinions to extract from the Tribes a reluctant commitment in a "reasonable and prudent alternative" to jeopardy to forego for an indefinite period the use of a portion of their senior water rights so as to permit FWS to engage in research to test fish behavior with differing river flows.

Finally, when the FWS three years later designated critical habitat for the Colorado squawfish and razorback sucker, FWS failed to specifically consider the impact of its designation on the Tribes on the Reservations and on the Tribes' culture and society. Rather, FWS concluded on the basis of a six State mathematical model that whatever theoretical adverse economic impacts might occur in Colorado, New Mexico and Utah, they would likely be made up by additional water for use in Arizona, Nevada and California. FWS Critical habitat designation, 59 Fed. Reg. 13,384 (1994).

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[7] The 1991 biological opinions included incidental take statements developed under the authority of 16 U.S.C. §§ 1536(b)(4)and 1536(o) exempting agency actions from the ban on takings in § 9. However, the exemption on its face covers partial construction and partial operation of federal projects to deliver a portion of the Tribes' federal reserved water rights. There is nothing in the incidental take exemption which purports to protect the Tribes and their members from criminal penalty were their members to engage in significant habitat modification causing injury to the Colorado squawfish or razorback sucker.

The Tribes believe that had FWS honored Congress' plan to consider in a deliberate and sympathetic way the impact of threatened or endangered listing on the private lands and waters of the Tribes' Reservations, the Tribes would not have been coerced into contributing their water rights to FWS biology research under § 7. Nor would the Tribes and their members have become subject to criminal penalty through what they believe is an unsupportable regulatory redefinition of "take" in violation of *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984).

CONCLUSION

Like the Colorado squawfish and razorback sucker, the Tribes have been adversely affected by the spread of civilization to the American West. They, like endangered or threatened species, rely upon Congress for protection. In its zeal to do all that it can for threatened or endangered species, FWS has ignored the delicate balance which Congress has imposed on federal efforts to protect the species. In its zeal FWS has both deprived Reservation lands and waters of § 7 habitat protections and improperly exposed Tribal members to § 9 habitat penalties.

The Tribes request the Court to rule unlawful FWS' expansion of the criminal take penalties under the ESA for it embraces traditional actions taken by the Tribes and

their members in the management of their Reservation lands and waters.

Dated: March 1995

Respectfully submitted,

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(31)

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In The

Supreme Court of the United States

October Term, 1994

BRUCE BABBITT, Secretary of the United States Department of the Interior, et al.,

Petitioners,

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF *AMICUS CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION, THE AMERICAN SHEEP INDUSTRY ASSOCIATION, THE ROCKY MOUNTAIN OIL AND GAS ASSOCIATION, THE ALLIANCE FOR AMERICA, AND THE COALITION OF ARIZONA-NEW MEXICO COUNTIES FOR STABLE ECONOMIC GROWTH IN SUPPORT OF RESPONDENTS

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IDENTITIES AND INTERESTS OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, Mountain States Legal Foundation, The American Sheep Industry Association, The Rocky Mountain Oil and Gas Association, The Alliance for America, and Arizona – New Mexico Coalition of Counties for Stable Economic Growth, respectively, submit this brief *amicus curiae* in support of Respondents Sweet Home Chapter of Communities for a Great Oregon, *et al.* Written consent to the filing of this brief has been granted by counsel for all parties, copies of which have been filed with the Clerk of the Court.

Amicus, Mountain States Legal Foundation ("MSLF"), is a non-profit, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited government and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every state of the country. A large number of MSLF's members work in businesses involved in the utilization and development of natural resources and, as a result, are actively involved in many environmental issues. Many are engaged in oil and gas, mining, farming, timber harvesting, and ranching activities across the country and operate subject to the oppressive "harm" regulation.

Amicus, The American Sheep Industry Association ("ASIA") is a federation of forty-nine member states and is the national voice of the 110,000 sheep producers in the United States. ASIA was created in 1989 through the merger of the National Wool Growers Association and the American Sheep Producers Council. The history of these

predecessor organizations extends back over 120 years and represents the oldest livestock commodity group in the United States. The purpose of ASIA is to promote the general welfare of the sheep industry.

Amicus, Rocky Mountain Oil and Gas Association ("RMOGA") is a non-profit, trade association whose members account for more than ninety percent of all exploration, production, transportation, refining, and marketing operations occurring in the oil and gas industry within the states of Utah, Wyoming, Colorado, Idaho, North Dakota, South Dakota, Nebraska, and Montana. The exploration and extraction of hydrocarbons by RMOGA's members is essential to meeting the nation's energy needs.

Amicus, Alliance for America ("Alliance"), is a fifty-state network of more than five hundred independent grassroots organizations, whose collective membership numbers in the millions. These groups represent a variety of vocational, cultural, and policy interests, including farming, grazing, forestry, commercial fishing, mining, recreation, energy, animal welfare, private property protection, local government and various community and regional organizations. The Alliance was formed in 1991, and is intent on curbing excessive governmental regulation and the violation of constitutionally-protected property rights resulting in family and community despair.

Amicus, Arizona – New Mexico Coalition of Counties for Stable Economic Growth ("Coalition of Counties"), is an organization representing twenty counties and 736,022 people in the States of Arizona and New Mexico. The

Coalition was formed to protect the physical environment, customs, culture, economic stability and property rights of the citizens of the member counties. Many of the local government members of the Coalition have adopted local land use plans and environmental planning ordinances allowing these governments to assist the federal agencies in making federal land use decisions to protect the physical environment, customs, cultures and property rights of their citizens. Many of the member Counties also have appointed or retained endangered species committees or experts to assist them in reviewing and designing recovery plans to protect endangered and threatened species and private property rights. The Coalition of Counties has an interest in this Court's ruling regarding the definition of "harm" under the ESA because of its effect on local governments throughout America.

As demonstrated herein, the implications of Respondents' case far transcend their individual situations and are indicative of problems of nationwide magnitude. This case presents serious questions of how individual rights are to be protected from governmental excesses, both in the enforcement of laws for the ostensible protection of the environment, and in the administration of justice. Similarly, *Amici* believe it is vitally important for this Court to protect individual freedom in the face of increasing civil and criminal enforcement under the Endangered Species Act ("ESA") 16 U.S.C. § 1531-44.

Respondents, like many of *amici curiae*'s members, are engaged in socially valuable work. That is, they provide essential goods and services that improve and maintain the high quality of life we enjoy in this country. However, the FWS' harm regulation makes it unlawful

for a private citizen to use their own land for innocent and otherwise legitimate purposes, such as farming, building a home, or oil and gas exploration, if those uses would modify habitat and inadvertently injure a listed wildlife species. 50 C.F.R. § 17.3. *Amici* believe this extraordinary interference with private property rights is all the more severe because the triggering "injury" under the regulation might be no more than a non-physical injury to "essential behavior patterns." *Id.*

OPINIONS BELOW, JURISDICTION, AND STATUTES INVOLVED

Amici Curiae hereby adopt Respondents' description of the opinions below, jurisdiction and statutes involved.

STATEMENT OF THE CASE

The Endangered Species Act ("ESA"), codified at 16 U.S.C. §§ 1531-44 (1988), imposes certain duties that are designed to protect species that the U.S. Fish and Wildlife Service ("FWS") has listed as either "endangered" or "threatened."

Respondent's case concerns the legality of the FWS regulations that purport to implement the "take" prohibition imposed by ESA § 9. That statutory provision states, in relevant part:

> [W]ith respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to – . . .

> (B) take any such species within the United States or the territorial sea of the United States . . .
>
> (G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

Id. Any person who "knowingly" takes a listed wildlife species is subject to severe criminal and civil penalties (up to a $50,000 fine and imprisonment for one year for each taking). *Id.* § 1540(a) and (b); *see* 18 U.S.C. §§ 3559, 3571 (raising the maximum penalty to $200,000).

The ESA defines "take" as follows:

> The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

Id. § 1532(19). The ESA does not define the component term "harm," but the FWS has promulgated a regulation defining "harm" as:

> an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including, breeding, feeding, or sheltering.

50 C.F.R. § 17.3. *Amici* believe that this regulation is unlawful.

ARGUMENT

I. THE STRUCTURE OF THE ESA DEMONSTRATES THE CONGRESSIONAL DESIRE TO RESPECT PRIVATE PROPERTY RIGHTS

For the Framers of our Constitution, private property was "the clear, compelling, even defining, instance of the limits that private rights place on legitimate government." J. Nedelsky, *Private Property and the Limits of American Constitutionalism* 9 (1990). The Framers saw the protection of property rights – rights in land in particular – as "the first object of government." Federalist No. 10, at 78 (Madison) (C. Rossiter ed. 1961). The Takings Clause of the Fifth Amendment lies at the heart of the constitutional scheme to protect such individual rights; its purpose being "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). For the common good, individuals might be forced by the government to give up their property – but only upon payment from the public purse.

The FWS "harm" regulation destroys this careful balance between individual rights and community needs. It often allows a government agency to achieve public goals at the private expense of a single individual. The Takings Clause does not countenance that result. To the contrary, it specifically prohibits government from invading "private right under the pretext of the public good." *United States v. Lynah*, 188 U.S. 445, 470 (1903).

A. THE ESA IS ONLY APPLICABLE TO PRIVATE LANDS THROUGH LAND ACQUISITION

That Congress was aware of the constitutional sanctity of private property rights is apparent in the ESA's legislative history, which consistently repeats two themes: (1) federal land acquisition was Congress' answer to the problem of private land use inadvertently and indirectly injuring listed wildlife by adversely modifying their habitat; and (2) the ESA taking concept only prohibits other more direct and intentionally-caused injuries to listed wildlife.

Senator Tunney, the Senate floor manager for the ESA, made these points succinctly. He described the habitat modification problem and the taking problem as separate problems with separate solutions, just as the Senate Report did (*see* S.Rep. No. 307, *reprinted in* 1973, U.S.C.C.A.N. 2992):

> Many species have been inadvertently *exterminated by negligent destruction of their habitat*. . . . Under this bill, we can take steps to make amends for our negligent encroachment. The Secretary would be empowered to use the *land acquisition authority* . . . to acquire land for the use of the endangered species programs . . . *Through these land acquisition provisions*, we will be able to conserve habitats necessary to *protect fish and wildlife from further destruction*.
>
> Although most endangered species are threatened primarily by the destruction of their natural habitats, a significant portion of these animals are subject to predation by man for commercial, sport, consumption, or other purposes. The provisions of S. 1983 would prohibit

> the commerce in or the importation, exportation, or taking of endangered species except where permitted by the Secretary.

119 Cong. Rec. 25669 (July 24, 1973) (emphasis added).

The same approach was adopted on the House side. Rep. Sullivan, the House floor manager and Chairwoman of the House Committee with ESA jurisdiction (Merchant Marine and Fisheries), reiterated that habitat destruction would be addressed through land acquisition, while taking prohibitions addressed other hazards to listed wildlife:

> For the most part, the principal threat to animals stems from the destruction of their habitat. The destruction may be intentional, as would be the case in clearing of fields and forests for development or resource extraction, or it may be unintentional, as in the case of the spread of pesticides beyond their target area. . . . H.R. 37 *will meet this problem by providing funds for acquisition of critical habitat* through use of the land and water conservation fund. It will also enable the Department of Agriculture to cooperate with willing landowners who desire to assist in the protection of endangered species, but who are *understandably unwilling to do so at excessive cost to themselves.*
>
> *Another hazard* to endangered species arises from those who would capture or kill them for pleasure or profit. There is no way that Congress can make it less pleasurable for a person to *take* an animal, but we can certainly make it less profitable for them to do so.

119 Cong. Rec. 30162 (Sept. 18, 1973) (emphasis added). This emphatic dichotomy between habitat modifications

and ESA takings persists throughout the remainder of the ESA legislative history.[1]

The major Committee Reports and the statements of the relevant congressional leaders are in agreement that the ESA's answer to the habitat modification problem on private lands was compensatory land acquisition, not prohibition of private land uses in takings. Thus, *Amici* believe that this Court should, of course, require the use of the method that Congress chose to further the ESA's goals. The FWS's "harm" regulation unlawfully subjects private habitat modification actions to a more stringent standard than federal ones. A federal land use action can go forward if it does not result in "destruction or adverse modification" of designated critical habitat, which is defined as an alteration that "appreciably diminishes" the likelihood of "survival" of the *entire* "listed species."[2] In contrast, the "harm" regulation prohibits a private land use action from going forward if it impairs the essential behavioral patterns of even one individual. This stands the legislative scheme on its head, placing the most

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[1] *See also* H.R. Rep. No. 412 at 5 (to solve the problem of "destruction of critical habitat" in the U.S., the government would "acquire" and "set aside" that habitat); 119 Cong. Rec. 25676 (July 24, 1973) (remarks of Sen. Williams); 119 Cong. Rec. 30166 (Sept. 18, 1973) (remarks of Rep. Harrington); 119 Cong. Rec. 42451, 42535 (Dec. 19, 1973) (remarks of Sens. Moss and Stevens).

[2] 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02. If a federal action meets this standard and the comparable "no jeopardy" standard (*see id.*), it is entitled to an incidental take statement which insulates any described taking from prosecution.

onerous habitat obligations on private entities in derogation of the "federal lead" structure of the ESA.

Amici believe the absence of any statement in the legislative history that taking concepts do include habitat modification actions is far more persuasive as to legislative intent than the absence of the word "exclusive." This Court should not allow a regulatory provision to cause a major change in the law without "at least some discussion in the legislative history." *Dewsnup v. Timm*, 112 S. Ct. 773, 779 (1992). Insofar as the "harm" regulation includes habitat modification actions, it improperly renders the ESA § 5 (16 U.S.C. § 1534) land acquisition program and ESA § 7 critical habitat provisions insignificant. Instead, *Amici* urge this Court to acknowledge the ESA's compromise with private property rights. Habitat protection on private land is only to occur through ESA § 7 funding and permit controls, where applicable, and otherwise through land acquisition with compensation under ESA § 5.

B. THE DUTY OF CONSERVATION UNDER THE ESA RESTS SOLELY ON THE FEDERAL GOVERNMENT

Under ESA §§ 9(a)(1)(B) and 4(d), private landowners must avoid taking listed species. Private landowners, however, have no duty to manage their lands to assist in the "conservation" or recovery of listed species, as the text of the ESA and the United States' previous position before the United States Court of Appeals for the Ninth Circuit make clear.

Foremost among the aforementioned ESA limitations is the lack of authority to compel private and other non-federal landowners to manage their lands to assist in the "conservation" of listed species. The ESA simply does not provide the FWS such a broad license to establish a federal regulatory program, with severe penalties, to govern private land uses.

Under the ESA's statutory scheme, while federal agencies have "conservation" duties, private landowners do not. Consistent with the federal lead structure of the statute, ESA § 2(b) declares it "the policy of Congress that all *Federal* departments and agencies shall seek to *conserve*" listed species. 16 U.S.C. § 1531(c)(1) (emphasis added). This limited federal duty to conserve is then carried out in two other ESA provisions. ESA § 7(a)(1) requires each federal agency to implement some "programs for the conservation of endangered species and threatened species."[3] ESA § 4(f) also embodies the limited federal duty to conserve by requiring that the Secretary of the Interior prepare recovery plans for listed species.

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[3] 16 U.S.C. § 1536(a)(1). It is improper to read ESA § 7(a)(1) as creating such an all-encompassing federal duty to structure all federal actions to conserve, as the House Committee with ESA jurisdiction stated in rulemaking comments and as the FWS has agreed. *See* 51 Fed. Reg. 19954-55 (June 3, 1986). Instead, ESA § 7(a)(1) at most requires that a federal agency undertake some program to assist in conservation – it can take other actions under ESA § 7(a)(2) (16 U.S.C. § 1536(a)(2)) that avoid jeopardy but that do not advance conservation. *Id.* Only ESA § 7(a)(2) applies to all federal actions and sets the more limited federal duty not to "jeopardize the continued existence of listed species."

16 U.S.C. § 1533(f). Noticeably absent from the ESA definition of "conservation" is any reference to a private landowner's duty to conserve.

Significantly, there is no mention of "conservation" in the ESA § 9 taking concepts or in the regulations defining "harm" and "harass." This omission was intentional. The ESA creates conservation duties only for federal agencies. ESA provisions that apply to private persons and private lands, as well as to federal agencies, do not and cannot include any duty to assist in conservation or recovery. This Court's only previous ESA decision in *TVA v. Hill*, 437 U.S. 153 (1978), does not change the interpretation of the ESA's statutory scheme. In *Hill*, no ESA taking claim was even before this Court. The lower courts had found violations of federal duties under ESA § 7, not ESA § 9 takings. *See Hill v. TVA*, 419 F. Supp. 753, 755 and n.1 (E.D. Tenn. 1976), *aff'd in pertinent part*, 549 F.2d 1064, 1069-70 and notes 13 and 14 (6th Cir. 1977). This Court observed that it was not reviewing the existence of ESA violations, but only whether injunctive relief should issue and whether an implied repeal had occurred. *See* 437 U.S. at 156, 171-72. Thus, this Court expressed no holdings on ESA takings in *TVA v. Hill*.

The FWS has interpreted the ESA and the agency's own regulations in an *amicus* brief the United States submitted to the Ninth Circuit in *Palila v. Hawaii Department of Land and Natural Resources*, 852 F2d 1106 (9th Cir. 1988).[4] The United States filed this *amicus* brief to explain

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[4] The United States' brief explained why neither the ESA nor the implementing "harm" regulation permit using the ESA

why the district court's view (in a private citizen suit not involving the FWS) that an injury to the future recovery

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§ 9 "take" prohibition to advance "conservation" or recovery objectives:

> Imposing a duty under Section 9 to avoid habitat modifications that merely prevent or delay the recovery [*i.e.*, conservation] of an endangered species is not consistent with the overall structure of the Act. Without the significant qualification found in the Secretary's definition [of "harm"] (that habitat degradation must result in injury to the species), persons subject to Section 9 would be required to manage their property in a manner so as to promote the recovery of a listed species.
>
> The statute, however, creates such responsibility with respect to the activities and programs of the agencies of the federal government, and not other owners and managers of property, such as private entities or the states. [The brief then recites the federal duties to conserve in ESA §§ 2(c)(1) and 1536(a)(1), and the ESA § 3(3) definition of "conserve."] There is no reference to this term, however, in Section 9, which sets out the prohibitions, including the ban on takings, applicable to the conduct of all persons subject to the jurisdiction of the United States . . . . This omission is a strong indication that Congress did not intend, through the provision of Section 9, to impose a duty to conserve on such non-federal entities . . . .
>
> To be sure, the over-arching purpose of the entire statute is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be *conserved*, [and] to provide a program for the *conservation* of such endangered species and threatened species * * * ." 16 U.S.C. 1531(b) (emphasis supplied). Reliance on this broad statement of purpose cannot, however, overcome the limitations of the specific language Congress has chosen

rate (*i.e.*, conservation) of a listed species constituted "harm" and, therefore, violated the ESA taking prohibition.

Subsequently, the Ninth Circuit recognized that it must defer to the FWS's interpretation: "We inquire whether the district court's interpretation is consistent with the Secretary's construction of the statute since he is charged with enforcing the Act, and is entitled to deference." *Palila*, 852 F.2d at 1108.

Thus, due to both the structure of the ESA and the expert agency's interpretation adopted in the Government's *Palila amicus* brief, there is no authority for the

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> in Section 9 of the Act. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 177-178 (D.C. Cir. 1982). *The responsibility to conserve, as defined in the Act, is specifically directed to federal agencies and activities, and not to the other persons and entities that are subject to the civil and criminal penalties of the Act.* . . . [E]xistence of this specific language in Section 8 [that federal actions must avoid adverse modification of critical habitat] militates strongly against reading into Section 9, applicable to non-federal parties, a similar duty to avoid adverse modifications to habitat that would not necessarily inflict actual injury on the species . . . .
>
> Thus, the Secretary's interpretation of the term "harm" to exclude habitat modification that merely prevent recovery of a listed species accurately reflects Congressional intent as evidenced by the language, structure, and the legislative history of the statute. The district court's suggestion in *dicta* of a broader construction has no such support and therefore is plainly incorrect.

"Brief For the United States As *Amicus Curiae*." (Emphasis added). District Court Docket Entry No. 8, Plaintiff's Exhibit 5 at pp. 12-22.

Clinton Administration to force private landowners to manage their lands to promote the future conservation and recovery of a listed species.[5]

C. HABITAT MODIFICATION ACTIONS WERE PURPOSELY DELETED FROM THE DEFINITION OF "TAKE"

The Senate Committee on Commerce altered the ESA "take" definition to exclude habitat modification. As introduced, § 3(6) of S. 1983 defined "take" to include "destruction, modification, or curtailment of a [listed species'] habitat." *Endangered Species Act of 1973: Hearings on S.1592 and S.1983 Before the Subcomm. on Environment of the Senate Comm. on Commerce*, 93d Cong., 1st Sess. 54, 127 (1973) ("1973 Senate Hearings"). The Senate deleted the "destruction of habitat" language in the face of testimony from environmental groups that expanding the "take" concept to "include degradation of habitat" was desirable, and indeed necessary to cover an "animal or plant that is killed as a result of habitat destruction." 1973 Senate Hearings at 80, *see id.* at 86, 104, 108, 116.

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[5] Although the federal government cannot compel landowners to assist in the conservation of listed species, landowners may choose to do so voluntarily by preparing habitat conservation plans and seeking incidental take permits under ESA § 10(a). 16 U.S.C. § 1539(a). For a landowner to submit to the conservation standard under ESA § 10(a) is an entirely discretionary, not obligatory, act.

Instead of making habitat modification a "take," the Senate established "an accelerated land acquisition program" as the legislative answer to the habitat modification problem on non-federal lands. S. Rep. No. 307 at 4, *reprinted in* 1973 U.S.C.C.A.N. 2992. The Senate viewed such land acquisition as often "the only means of protecting endangered animals which occur on non-public lands." *Id.* These statements in the Senate Report confirm that the revised "take" definition could not have reached habitat modification actions on private lands. Thus, Congress' deletion of the habitat modification language precludes the FWS from defining takings to include habitat modification actions. Since the "harm" regulation reaches a result that Congress "expressly declined to enact," it is invalid. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 196, 200 (1974).

Amici believe that the Senate's choice maintains the historic exclusion of private land use actions from being wildlife takings and retains the constitutional sanctity of private property rights. It also avoids sensitive issues concerning whether the federal government has the constitutional authority to regulate private land use to protect wildlife. *See Kleppe v. New Mexico*, 426 U.S. 529, 546-47 (1976).

II. THE "HARM" REGULATION DEMONSTRATES THE FWS' PENCHANT FOR OVERREGULATION

Because so many plants and animals are considered "endangered" by the federal government, their whereabouts are not limited to remote national parks, national forests or sparsely populated areas of the West. Instead,

they can be found in every state, on public and private property – even in New York City and Washington, D.C. *See Endangered Species Blueprint*, National Wilderness Institute Vol. 5, 1994. *Amici* wish to underscore to the Court that a "species" for purposes of ESA protection means:

> The term "species" includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.

16 U.S.C. § 1532 (16).

Clearly, the terms "species," "subspecies" and "distinct population" have different meanings. In biology, species and subspecies are not used interchangeably because they are not the same thing. Certainly neither of these terms is the same as the term "distinct population," which has no scientific definition. With an increasing focus on groups below the species level, the FWS contrives to swell the ranks of the federal endangered species program with slight variants of otherwise abundant species. Thus, the "harm" regulation has become a bureaucratically-minted tool for the federal land use management of private property. The tool becomes a convenient means because the subjectivity of determining subspecies and distinct populations allows one to find some plant or animal with which to oppose virtually anything.[6]

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[6] This is demonstrated with a simple hypothetical situation. Eight subspecies of pocket gophers restricted to Utah are currently on the FWS's candidate list. Suppose a county government in Utah has planned some community improvements such

Amici, many of who's individual members have suffered because of this bureaucratic weapon, believe that these types of abuses will certainly hurt true conservation efforts in the long run as the public becomes more skeptical about the "crisis-species-of-the-day," as no conservation program will succeed without the support of the public.

Concern over the FWS's regulatory expansion (and abuse) is growing nationwide with good reason. Why the new quest to regulate enormous areas of private land? A recent General Accounting Office publication sheds light on the FWS' motive – bureaucratic self-preservation:

> a predominate number of the species protected under the Endangered Species Act have the major share of their habitat on nonfederal lands. Specifically, of the 781 species for which the Service was responsible as of May 1993, 712 – over 90 percent – have habitat on nonfederal lands. Of these, . . . 517 have over 60 percent on their total habitat on nonfederal lands.

"Information on Species Protection on Non Federal Lands" General Accounting Office, 1 December 1994.

The national significance of the GAO report, therefore, is heightened by the fact that the "harm" regulation

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as a new elementary school and a reservoir. The projects will adversely affect some pocket gophers. If the pocket gopher, *Thomomys umbrinus*, is considered at the species level it might be determined that the project would affect only 2.5% of all the pocket gophers in Utah. However, if only one of its eight subspecies is monitored, it might appear that the impact is more severe with 20% affected. One case may be considered acceptable while the other may 'jeopardize' the animal's existence.

makes it unlawful for a private citizen to use his or her own land, for innocent and otherwise legitimate purposes, if that use would modify habitat and inadvertently injure a listed wildlife species. 50 C.F.R. § 17.3. That extraordinary interference with private property is all the more offensive because the triggering "injury," under the regulation, need be no more than a non-physical injury to "essential behavioral patterns." *Id.* To the extent that the FWS has sought to convey the impression that its enforcement of the harm regulation never entails the exercise of power over large tracts of land, that impression is false. Many examples abound to the contrary:

> The plan to protect the California gnatcatcher covers 3.8 million acres of both public and private land. *Special Rule Concerning Take of the Threatened Coastal California Gnatcatcher*, 58 Fed. Reg. 65,088 (December 10, 1993).
>
> The FWS claims that as many as 35 million to 42 million acres of land are *necessary* to the survival of the grizzly bear. *Barker, Saving All The Parts* 34 (1993).
>
> FWS has used the "harm" regulation even to the point of preventing modest clearing efforts conducted in the interest of fire prevention in populated areas. *See Determination of Endangered Status for the Delhi Sands Flower-loving Fly*, 58 Fed. Reg. 49, 881,49,884-86 (September 23, 1993) (destruction of species habitat by removal of native vegetation for fire prevention on private land could be interpreted to constitute "take").

In correctly finding that the "take" prohibition in ESA § 9 does not extend to ordinary land use actions that may inadvertently injure listed wildlife, as it would

under the "harm" regulation, Judge Sentelle of the Court of Appeals observed:

> I have in my time seen a great many farmers modifying habitat. They modify by plowing, by tilling, by clearing, and in a thousand other ways. At no point when I have seen a farmer so engaged has it occurred to me that he is taking game. Nor do I think it would occur to anyone else that he was taking wildlife.

Pet. App. 69a.

It is of little wonder then that landowners across the nation have become outraged and adamantly disagree with the FWS' often ludicrous claims that otherwise long-standing uses of their private property could now be charged as "takings" of endangered species.

Worse yet, many like *amicus* MSLF's members Anna M. Klimko, Ishmail Garcia, and Mike Rowe of Winchester, California, nearly paid the ultimate individual price for endangered species "protection." While they fortunately escaped with their lives, their homes were not so fortunate. They had the ill-fortune of being within the FWS' Stephens Kangaroo Rat ("SKR") habitat zone, where severe restrictions were placed on private property owners. In addition to destroying the value of their properties, the FWS strictly prohibited discing five inches into the soil for brush control around their homes to appease the FWS' concerns that these actions would "harm" the Kangaroo Rat. These restrictions subsequently created tremendous brush growth and fuel load. Then the unthinkable happened, the rural residential areas inside the SKR habitat study area ignited. Three days later, the resulting firestorm had burned 25,100 acres and

destroyed twenty-nine homes. Sadly, the FWS ignored the dignity and rights of these individuals in favor of a rodent, which the FWS later determined had moved out of the area because it did not like the resulting density of brush. Such an example illustrates the tremendous power the FWS is wrongly exercising over private property. Congress did not intend such a result. To the contrary, the organization of the ESA reflects an inherent respect for private property. See pp. 6-16 *infra*. *Amici* believe this case demonstrates the danger of bureaucratic power if that power is left unchecked.

III. A DELEGATION DOCTRINE THAT ALLOWS CONGRESS TO ABDICATE ITS POWER TO DEFINE THE SPECIFIC ELEMENTS OF A CRIMINAL OFFENSE, IN FAVOR OF AN UN-ELECTED ADMINISTRATIVE AGENCY, VIOLATES THE SEPARATION OF POWERS

The United States Constitution provides that "[a]ll legislative powers herein shall be vested in a Congress of the United States." U.S. Const., Art. I, § 1. From this provision is derived the anti-delegation doctrine which provides that Congress generally cannot delegate its legislative power to another branch of government.

This Court has consistently reaffirmed and given voice to the central judgment of the Framers of the Constitution that, within our political scheme, the separation of powers into three coordinate Branches is essential to the preservation of liberty. *See Morrison v. Olson*, 487 U.S. 654, 685-696 (1988); *Bowsher v. Synar*, 478 U.S. 714, 725 (1986).

James Madison, in writing about the principle of separation of powers, stated: "[n]o political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty." *The Federalist* No. 47, p. 324 (J. Cooke ed. 1961). Further, Madison defended the Constitution against charges that it established insufficiently separate Branches. Separation of Powers, he wrote, "d[oes] not mean that these [three] departments ought to have no *partial agency* in, or no *controul* over the acts of each other," but rather "that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted." *The Federalist* No. 47, pp. 325-326 (J. Cooke ed. 1961) (emphasis added). *See Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 951 (1983).

Nonetheless, Congress may permissibly seek assistance, within proper limits, from its coordinate branches. However, before the delegation is made, Congress must first "lay down by legislative act an *intelligible principle* to which the person or body authorized to [act] is directed to conform. . . . " *J.W. Hampton, Jr. & Co. v. United States*, 272 U.S. 394, 409 (1928) (emphasis added). In 16 U.S.C. § 1540 (f), Congress delegated rulemaking authority under the ESA to the FWS to make regulations to enforce the Act. Further, in 16 U.S.C. § 1538(a)(1)(g), Congress made it unlawful to violate a FWS regulation made under the ESA.

However, *Amici* believe that this Court should require greater specificity when Congress delegates authority to an agency, such as the FWS, to pass regulations that contemplate criminal sanctions. This issue was

expressly left unresolved by this Court in its most recent delegation case, *Touby v. United States*, 500 U.S. ___, 114 L.Ed.2d 219, 227 (1991).

There can be found no support for the notion that Congress can delegate to the FWS the legislative power to define what acts "harm" endangered species for the purpose of potential criminal liability. *Amici* argue that greater specificity is required in the criminal context because of the heightened risk posed to individual liberty. The "intelligible principle" standard exposes a profound legal paradox in the context of defining criminal laws: the broader, the more "flexible" the legislative grant of power in any given legislation, the less the citizenry is protected from potential discretionary abuse at the hands of administrative officials such as the FWS.

There is no statute that makes it a federal crime to put private property to otherwise lawful use. This Court has stated that "the definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Liparota v. United States*, 471 U.S. 419, 424 (1985).

While civil penalties are inherent within a regulatory scheme, the serious question posed by this case is whether the grant of power to define certain terms for regulatory purposes rises to a power within the FWS to define the elements of a criminal offense. A delegation doctrine that allows Congress to abdicate its power to define the elements of a criminal offense, in favor of an un-elected administrative agency, such as the FWS, does violence to the time honored separation of powers principle. *Amici* urge this Court to confirm the constitutional

rule that only Congress, and not an administrative agency, may define the essential elements of a criminal offense.

IV. THE "HARM" REGULATION CONFLICTS WITH THIS COURT'S PREVIOUS DECISIONS ON STATUTORY INTERPRETATION AND THE RULE OF LENITY

Amici submit that the FWS' "harm" regulation violates statutory construction principles under the principle of statutory construction known as *noscitur a sociis*. This Court has long held that a general term in a statutory list should be interpreted narrowly "to avoid the giving of an unintended breadth to the Acts of Congress." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). The ESA employs the general word "harm" in a list of words with more precise meanings:

> The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

16 U.S.C. § 1532(19). Since none of the other "take" terms include private land use or habitat modification actions, neither should "harm."

The Court of Appeals properly reasoned that because "the nine verbs accompanying 'harm' [in the ESA's definition of "take"] all involve a substantially direct application of force," then the term "harm" had been used by Congress in that sense as well. Pet. App. 5a. This Court has recently reiterated that lower federal courts should "not resort to legislative history to cloud a statutory text

that is clear," even when there exist "contrary indications in the statute's legislative history." *Ratzlaf v. United States*, 510 U.S. ___, 114 S.Ct. 655, 662-63 (1994). *Cf. City of Chicago v. Environmental Defense Fund*, 511 U.S. ___, 114 S.Ct. 1588, 1593 (1994) (Scalia, J.) ("[I]t is the statute, and not the Committee Report, which is the authoritative expression of the law").

Similarly, traditional notions of deference to agency expertise in decision-making should have no application to a provision, such as the "harm" regulation, that effectively criminalizes ordinary activities. *Amici* believe that this Court's ruling in *Chevron U.S.A. v. National Resources Defense Council*, 467 U.S. 837 (1984) is, therefore, not controlling. Instead, as a number of this Court's recent decisions have so indicated, the rule of lenity should prevail over an agency's contrary view of a statute when such statute contemplates severe criminal or punitive sanctions. *See United States v. Thomson/Center Arms Co.*, ___ U.S. ___, 112 S.Ct. 2102, 2109-10 (1992) (plurality opinion of Justices Souter, Rehnquist and O'Connor); *Crandon v. United States*, 494 U.S. 152, 177-78 (1990) (concurring opinion of Justices Scalia, O'Connor and Kennedy that the rule of lenity prevails over *Chevron* deference to the agency). *See also United States v. X-Citement Video, Inc.*, ___ U.S. ___, 63 U.S.L.W. 4019 (U.S. Nov. 29, 1994).

However, assuming *arguendo* that this penal statute is ambiguous as the FWS says it is, "[t]hen the rule of lenity requires that the construction allowing [Respondents] more liberty rather than less be applied by the courts." *Ratzlaf v. United States*, 510 U.S. ___, 114 S.Ct. 655, 662-63 (1994); *Hughey v. United States*, 459 U.S. 411, 422 (1990). The rule of lenity "demand[s] resolution of ambiguities in

criminal statutes in favor of the defendant." *Ratzlaf*, 114 S.Ct. at 663. This "serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." *Crandon v. United States*, 494 U.S. 152, 158 (1990). Following the rule of lenity is especially important in *malum prohibitum* offense situations such as this case because persons of good conscience may not recognize the wrongfulness of the conduct when they engage in it. For example, *amici* in the course of their lawful and socially productive work harvest timber, till the soil, explore for oil and gas, and put water to beneficial use. However, any of these activities might unknowingly trigger "injury," which, under the regulation, might need no more than a non-physical injury to "essential behavior patterns." 50 C.F.R. § 17.3. *Amici* wish to underscore to the Court the fact that the standard for criminal liability is no different under the ESA than it is for civil liability. Thus, there is no difference between civil and criminal concepts of "harm."

As this Court acknowledged in both *Crandon*, 494 U.S. at 160 and *Ratzlaf*, 114 S.Ct. at 663: "Because construction of a statute must be guided by the need for *fair warning* [to defendants], it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text [of the statute itself]." [Emphasis added.] *See also United States v. Bass*, 404 U.S. 336, 347-50 (1971) ("fair warning" should be given *"in language that the common world will understand"*) (emphasis added).

The majority of the federal environmental statutes criminalize certain conduct by persons within the regulated community. In particular, most of these statutes

target for criminal liability certain conduct that is engaged in "knowingly." Similarly, ESA § 1540(a) and (b) create civil and criminal liability for "knowing" violations of the ESA or FWS regulations. The term "knowing" has been interpreted by the lower courts to require only knowledge of one's actions, not that one was knowingly taking an endangered species. *See United States v. Nguyen*, 916 F.2d 1016, 1018, 1019-20 (5th Cir. 1990) (discussing the ESA amendments of 1978 and the Congressional choice to make criminal violations of the ESA a general, rather than specific, intent crime). *Amici* argue that while Congress might have lowered the *mens rea* requirement in ESA § 9, the FWS regulation reduces the potential culpability to such a low level that no socially productive member of society could not be brought within the governments prosecutorial discretion. The FWS regulation, therefore, flouts the Congressional desire to require a *mens rea* requirement in ESA § 9.

As Blackstone stated: "An unwarrantable act without a vicious will is no crime at all." The vicious will is the *mens rea*. Reduced to its essence, *mens rea* refers to the choice to do a blameworthy act. The requirement of *mens rea* is rationalized on the common sense view of justice that blame and punishment are inappropriate and unjust in the absence of that choice. *Id.*

This Court follows the "familiar proposition that 'existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.' " *United States v. United States Gypsum Co.*, 438 U.S. 436 (1978). On numerous occasions, this Court has relied upon the words of Justice Jackson in *Morissette v. United States*:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory, 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will.' (Footnotes omitted).

342 U.S. 246, 250-251 (1952).

As stated by this Court in *United States v. United States Gypsum Co.*:

> Although Blackstone's requisite 'vicious will' has been replaced by more sophisticated and less colorful characterizations of the mental state required to support criminality . . . intent *generally remains an indispensable element of a criminal offense.* This is true in a sophisticated criminal antitrust case as in one involving any other criminal offense.

438 U.S. 436, 437 (1987). (Emphasis added.)

This Court's recent decisions in *Ratzlaf* and *X-Citement Video, supra,* directly affect this case because they prescribe the methodology for statutory construction of

the *mens rea* element of ESA § 9. Application of that methodology to the ESA "take" provision mandates that the statutory term be accorded its plain meaning – that awareness of unlawfulness is required – not the agency's vague and overbroad regulation that potentially criminalizes innocent, socially productive activities. *Amici* strongly believe it is fundamentally unfair to subject otherwise legitimate and lawful uses of private property to bureaucratic oversight on the suspicion that citizens might unwittingly be causing non-physical injury to "essential behavioral patterns of endangered species."

CONCLUSION

Amici Curiae respectfully request that this Court affirm the judgment of the United States Court of Appeals for the District of Columbia, holding that the FWS regulation in this case is *ultra vires* of the ESA and violative of the constitutional principles discussed herein.

Respectfully submitted,

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